SUPREME COURT, U.S.
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No.

IN THE

Supreme Court of the United States

JUAN C. ESPINOSA; MAUREEN ROIG-ESPINOSA,
PETITIONERS

v.

COUNTY OF UNION ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a district judge find as a fact in a summary judgment procedure that a tenured jail guard's testimony against his fellow jail guards for abusing prisoners was not a motivating factor in the County's decision to terminate his employment when it was admitted that his testimony made it unsafe for him to return to the jail and the County admittedly only ordered him to return to the jail as a means to force his resignation or termination?

2. Did Petitioner "abandon" his job as a jail guard when he refused to return to the County jail which admittedly became unsafe and retaliatory given his testimony against fellow jail guards for abusing prisoners?

3. Does a public employer have a duty to provide alternative employment for whistleblowers such as the Petitioner who cannot return to their former workplace without risking serious bodily harm or death?

4. Did the summary judgment process below deny the Petitioner due process of law when the district judge used the procedure to usurp the role of the jury by making findings of fact about the lack of causation between the Petitioner's protected conduct and his termination; whether the Petitioner who had received death threats from his co-employees for his role in helping the police root out corruption at the County jail reasonably declined the County's order to return to the jail as a jail guard where he would work shoulder to shoulder with these same co-employees; whether the Petitioner's life would be placed in jeopardy by returning him to the County jail in the circumstances; whether the

Petitioner's request for alternative employment was reasonable under the circumstances; whether the County acted within its rights in terminating the Petitioner's employment; and whether the County denied the Petitioner the free exercise of his federal constitutional or civil rights or deprived him of the protection due him as a "whistleblower" under state law?

PARTIES TO THE PROCEEDING

JUAN C. ESPINOSA; MAUREEN ROIG-ESPINOSA, PETITIONERS

COUNTY OF UNION; STATE OF NEW JERSEY; POLICEMEN'S BENEVOLENT ASSOCIATION UNION COUNTY CORRECTIONS OFFICERS LOCAL #199, INC.; JOHN DOES 1-25 (fictitious names intending to designate currently unknown entities and persons, individually and in their official capacities; COUNTY OF UNION BOARD OF CHOSEN FREEHOLDERS; UNION COUNTY PROSECUTOR'S OFFICE; JAMES J. DURKIN, individually and in his official capacity; THEODORE J. ROMANKOW, UNION COUNTY PROSECUTOR in his official capacity, and his predecessors and successors also known as THEODORE J. ROMANLOW; THOMAS K. ISENHOUR, individually and in his official capacity; DIRECTOR JAMES E. COLEMAN; JAMES F. DOUGHERTY, JR.; HAROLD GIBSON; MICHAEL J. LAPOLLA County of Union and County of Union Board of Chosen Freeholders

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey was issued on August 30, 2005, and it is an unpublished opinion. (App. 68a, 28a) The opinion of the United States Court of Appeals for the Third Circuit was issued on January 9, 2007, and it is an unpublished opinion. (App. 1a, 2a) A petition for Rehearing and Petition for Rehearing En Banc was timely filed, and was denied on February 26, 2007. (App. 72a)

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1). A Petition for Rehearing and Petition for Rehearing En Banc was timely filed, and was denied on February 26, 2007. (App. 72a) Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

RELEVANT PROVISIONS INVOLVED

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

"[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured....",

N.J.S.A. § 34:19-3:

"forbids employers from retaliating against an employee who... [p]rovides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law... or [o]bjects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes... is incompatible with a clear mandate of public

policy concerning the public health, safety or welfare...."

N.J.A.C. § 4A:2-6.2(b):

"[a]ny employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied."

STATEMENT

On June 18, 1995, detainees at the Esmor Federal Detention Center protested inhumane conditions at the facility. In response, some were transferred to the Union County Jail in Elizabeth, New Jersey. Upon their arrival, they were severely beaten and tortured by numerous County jail guards. The beatings and conspiracy to cover up the beatings received wide attention through extensive reporting in local and national newspapers.

Subsequently, the County Prosecutor contacted the Petitioner because several of the abused detainees identified the Petitioner "as the only Jail Guard who tried to help them." And so began a long process of Petitioner's aid. A sample of the help: the Petitioner volunteered to wear a body wire inside the jail; surreptitiously obtained documents from the jail; allowed the Prosecutor to set up a tape-recording machine at his home; testified before the grand jury; and ultimately testified in several high visibility

criminal trials. (App. 3a) According to the Prosecutor, the Petitioner was "more than willing" to testify before the grand jury and his assistance was "pivotal and probably the most important [to the investigation]."

After Petitioner's cooperation became known, the Prosecutor ordered the Petitioner out of the jail because he could have been "killed." Jail guards then undertook a campaign of intimidation including death threats against Petitioner and his family. The Petitioner was placed "on loan working with the Prosecutor's Office" for the next three years during which time he assisted the Prosecutor in preparing for the trials of his fellow jail guards and testified against them. Ten jail guards either were convicted or plead guilty to the beatings and many of them, including the then Union President, the "upholder of the code of silence," served extended prison sentences.

Given what the Prosecutor described as Petitioner's "integrity, bravery and willingness to make great personal sacrifice in the face of danger," another jail guard testified that the Petitioner was considered by "all of the Corrections Officers as a 'scumbag' and a 'rat'." Following the incarcerations, the union's newsletter accused the Petitioner of conspiring with prosecutors, fundraisers were held for the convicted jail guards, and virtually every jail guard signed petitions in support of them.

The County admitted that "[the petitioner] would be unable to return to work in the Union County Jail at the conclusion of the criminal prosecutions which resulted from the Esmor investigation."

After the trials ended, the petitioner continued receiving his base pay; it was "undisputed that [Petitioner] was a civil service employee who had a property interest in his job." (App. 16a) Following the trials, and because he could not return to the jail, Petitioner pursued law enforcement positions outside New Jersey but was unable to secure comparable employment, instead finding that he would lose at least two-thirds of his salary, his rank, and tenure. So he met with the County Manager and requested employment with the County outside the jail. Although the County freely acknowledged it could have found alternative employment for the Petitioner, it at no point made any efforts.

Instead of looking for alternative employment for the Petitioner, the County took another tack. The Prosecutor, acutely aware of Petitioner's "fear of going... back to work," suggested to the County that if it wanted him to resign, they should "call him back to work and fire him." Without any reservation, the County followed this suggestion and provided Petitioner with a Hobson's choice -- either come back to work, which he admittedly could not do, or be fired -- in order to terminate his tenured employment. According to the County, that was "the only way" to "fire him" given it "was undisputed" that the Petitioner remained a "tenured employee entitled to the protections of the Civil Service Act and its implementing regulations," until the day of his dismissal.

Petitioner immediately objected to the order in writing and made numerous written and oral pleas for

comparable employment outside the jail. Petitioner's objection and pleas were ignored.

The County terminated Petitioner's employment on account of "abandonment" and asserted to the Court of Appeals that "there is no evidence whatsoever that plaintiff was terminated for any reason other than the fact that he refused to return to work when directed to do so." (*See* App. 13a)

The Court of Appeals took "as true [Petitioner's] assertion that he could not return to work" given "the ample evidence of the union's animus towards him and the retaliation he would likely face if he returned to the Jail." (App. 23a, 27a)

Petitioner, who is now 49 years old with two children, earns less than half his County salary, holds an untenured position with a lower rank, and lost his County pension that had been vesting for 12 years. Petitioner's unopposed economic expert determined that the present value of Petitioner's economic loss resulting from his wrongful termination given his reduced salary, loss of benefits and pension, and overtime pay, exceeds a million dollars.

REASONS FOR GRANTING THE PETITION

1. The Third Circuit Did Not Follow This Court's Jurisprudence Concerning First Amendment Claims And Strong Public Policy Justifies Granting This Petition And Not Exposing An Employee To Grievous Bodily Injury or Death Because Of His Whistleblowing Conduct.

Petitioner's testimony made it unsafe for him to return to work. Given this, and because the County only ordered him to return to work as a means to "fire him", the Petitioner's concededly protected conduct in testifying about governmental misconduct (App. 44a), (and objecting to the order that he return to the jail for fear of certain retaliation from fellow jail guards) was not just a "substantial factor" or "motivating factor", but was the *only* factor in his termination. *See Mt. Healthy City Bd. of Ed. v. Doyle 429 U.S. 274, 287(1977).* The County could not, nor did it try to, show that it would have terminated Petitioner in the absence of his testimony. Hence Petitioner's prima facie First and Fourteenth Amendment claims, along with his state law claim under *N.J.S.A. § 34:19-3 (*New Jersey's legislation to protect whistleblowers), which has "very similar" elements (App. 11a), were never rebutted. *See Crawford v. Briton, 523 U.S. 574, 593 (1998),* ("when a public employee shows that protected speech was a 'motivating factor' in an adverse employment decision, the employer still prevails by showing that it would have reached the same decision in the absence of the protected conduct.") The Petitioner was penalized for his protected speech because if he never testified, he would still have his tenured position. *See Perry v. Sinderman, 408 U.S. 593, 597 (1972)*(noting that the

government may not deprive a person of a benefit on the basis of his "constitutionally protected interests-especially, his interest in freedom of speech.")

The Court of Appeals' determination that the Petitioner was unable to establish his claims given *his* conjecture that he would not have been terminated if he returned to the jail (App. 13a, 14a), imposed a requirement on Petitioner that this Court has not. *See Hartman v. Moore, 126 S. Ct. 1695, 1703 (2006)*, "our discussions of the elements of the constitutional tort do not specify any necessary details about proof of a connection between the retaliatory animus and the discharge, which will depend on the circumstances." The Court of Appeals' factual determination that Petitioner was unable to establish a retaliatory animus subverted the very purpose of § 1983 -- to provide a remedy for the violation of federal rights -- and immunized the County for depriving the Petitioner of his property interest in his job without any basis. *See Owen v. City of Independence*, 445 U.S. 622, 651 (1980) noting "[h]ow 'uniquely amiss' it would be, therefore, if the government itself -- the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct -- were permitted to disavow liability for the injury it has begotten."

Beyond this, the Court has held that certain employer conduct can be unlawful even if it is done "in good faith" if it inherently discourages protected activity, based on the common-law rule that a man is held to intend the foreseeable consequences of his conduct. *See NLRB v. Erie Resister Corp., 373 U.S. 221, 228 (1963); International Ladies Garment Workers*

Union v. NLRB, 366 U.S. 731,738-739 (1961); Radio Officers v. NLRB, 347 U.S. 17, 45 (1954). The County's firing of Petitioner for refusing to return to a place where he would be "killed" because of his testimony, discourages any law enforcement official from testifying truthfully against his "blue brethren."

There are important public policy reasons for insuring that jail guards -- indeed, any public law enforcement official -- be able to speak out freely or to help police root out corruption without fear of retaliation through a "code of silence." The judicial system is designed to resolve disputes and right wrongs, but this can only be done if the system itself encourages uninhibited testimony. The integrity of the trial system, the penal system and the corrections systems as well as the public's confidence in law enforcement hinges on the ability of persons such as the Petitioner to help identify misconduct without being punished for his socially valuable conduct.

The pervasiveness of the code of silence in law enforcement has been well documented and vexed communities for years. Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability,* 80 B.U.L.Rev. 17, 18 (2000). The practice in law enforcement of informally punishing and shunning whistleblowers has a tremendous cost to society and discouraging them from coming forward emboldens the wrongdoers. Roberta A. Johnson, *Whistleblowing and the Police,* 3 RUJLURBP 74, 81 (2005). The code of silence is perpetuated only when other officers are made to understand what happens to those officers who don't abide by the code. 80 B.U.L. Rev. at 77 (2000). The Court of Appeals' endorsement

of the County's derailing of Petitioner's law enforcement career and severe financial deprivation to the Petitioner, does just that.

Leaving intact the Court of Appeals' decision will leave a jail guard such as the Petitioner with the impossible choice of (1) testifying untruthfully before the grand jury as well as at trial and risk a perjury prosecution and/or a charge of interfering with a criminal investigation; (2) testifying truthfully and risk being subjected to disciplinary action for failing to return to a workplace which is admittedly now unsafe; or (3) returning to the workplace and risk grievous bodily harm or even death.

The Petitioner did not deserve to have to return to an unsafe workplace in order to save his job; he should have been offered an alternative employment opportunity so that he could retain his tenured employment. The County's refusal to do so subverts the important social policy of protecting whistleblowers and warrants this Court reversing the judgment below.

2. The Summary Judgment Granted By The Lower Courts Is Unconstitutional Because It Denied The Petitioner's Seventh Amendment Right To A Jury Trial And Wrongly Allowed The District Court To Find Facts Within The Jury's Sole Province.

The Seventh Amendment provides that in suits at common law, "the right of trial by jury shall be preserved...." As Justice Scalia observed in *Blakely v. Washington*, 542 U.S. 296, 305-306 (2004), the right to a jury trial is no mere procedural formality but rather a fundamental "reservation of power in our constitutional

structure," assuring the people's ultimate control of the judiciary. *Id.* citing *The Complete Anti-Federalist* 315, 320 (H. Storing ed. 1981). Not surprisingly then, courts caution that summary judgment under Rule 56 is "an extreme remedy" that should be cautiously invoked. See *Inland Oil & Transport Co. v. U.S.*, 600 F.2d 725, 727 (8th Cir. 1979), *cert. denied*, 444 U.S. 991 (1980).

According to summary judgment procedure, the County bore the burden of proving that no genuine issue of material fact exists; reviewing courts are bound to draw all justifiable inferences in the non-movant's favor and refrain from making credibility determinations. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151(2000).

The Court of Appeals overreached and erroneously decided questions of fact and inferences therefrom in favor of the moving party. Certiorari should be granted to rectify the overreaching, particularly in light of the important public policy implications of the Court of Appeals' holding.

In its opinion, the Court of Appeals laid out Petitioner's evidence of retaliation as threefold, the most important of which was the County's order for him to return to the jail, which the Court conceded entailed life-threatening risk. After reciting the Petitioner's evidence, the Court of Appeals articulated the County's sole defense: the Petitioner was fired because he refused to return to work. Without explicitly doing so, the Court began with the formula for evaluating civil rights claims, that the plaintiff proffers protected speech and an adverse employment

action, and the defendant counters by showing that it would have reached the same decision in the absence of the protected speech. Instead of then proceeding to analyze Petitioner's claims on the basis of the facts he presented along with favorable inferences therefrom, the court interjected an analysis not forwarded by the parties and unsupported by the law or undisputed facts. Specifically, the Court of Appeals concluded that Petitioner had a "weak" constitutional interest in his position.[1] (App. 17a) This *sua sponte* analysis was fatally defective and led to the deprivation of Petitioner's constitutional rights. Additionally, the analysis involved two other issues the Court concluded were dispositive.

First, the Court concluded that the County's order that the Petitioner return to work was inconsistent with a desire to terminate him. This proposition carries the soundness of logic along with its defect: its separation from context. Petitioner could not return to the jail.

Second, the Court of Appeals found that Petitioner expected to be taken off the County's payroll, so he may not "now claim the County's following through on this intention was in retaliation for his testimony." (App. 14a) The Court's subjective

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[1] The law provides no guidance for how to determine an interest's relative weakness or strength, its legal basis, or its legal effect. The notion requires some attention as it threatens broadly, and specifically here, to completely undermine a straightforward proposition of constitutional law.

understanding, however, was plainly contradicted by Petitioner and the County.[2]

The County's professed motive – terminating an employee who was not reporting to his position – in firing Petitioner received incidental evaluation with respect to Petitioner's breach of contract and breach of good faith and fair dealing claims. When the Court of Appeals reviewed Petitioner's claim that his termination violated his statutory rights, it overlooked a critical provision of the abandonment statute. Namely, the statute in question, *N.J.A.C.* § 4A:2-6.2 (b), requires that permission to remain absent from work "shall not be unreasonably denied." We assume with deference to the Court of Appeals that it considered this sentence of the statute, despite its absence from the opinion. Such a conclusion, however, would necessitate a finding that it is reasonable for an employer to order an employee to return to a position concededly hazardous. This presents an untenable construction.

The summary judgment process violated due process, undermined the Petitioner's right to a jury trial under the Seventh Amendment, and crossed the lines set by Rule 56.

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[2] This point forwarded by the Court of Appeals rests on a letter drafted by the Prosecutor -- which he described as "pure fluff" and replete with "untrue" statements -- and the County explicitly disavowed the letter as representing its contractual relations with the Petitioner and declared that it was immaterial to his termination.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 05-4278; No. 05-4382

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JUAN C. ESPINOSA; MAUREEN ROIG-ESPINOSA, his wife, Appellants in No. 05-4278

v.

COUNTY OF UNION; STATE OF NEW JERSEY; POLICEMEN'S BENEVOLENT ASSOCIATION UNION COUNTY CORRECTIONS OFFICERS LOCAL #199, INC.; JOHN DOES 1-25 (fictitious names intending to designate currently unknown entities and persons, individually and in their official capacities; COUNTY OF UNION BOARD OF CHOSEN FREEHOLDERS; UNION COUNTY PROSECUTOR'S OFFICE; JAMES J. DURKIN, individually and in his official capacity; THEODORE J. ROMANKOW, UNION COUNTY PROSECUTOR in his official capacity, and his predecessors and successors also known as THEODORE J. ROMANLOW; THOMAS K. ISENHOUR, individually and in his official capacity; DIRECTOR JAMES E. COLEMAN; JAMES F. DOUGHERTY, JR.; HAROLD GIBSON; MICHAEL J. LAPOLLA County of Union and County of Union Board of Chosen Freeholders, Appellants in No. 05-4382

December 12, 2006, Argued

January 9, 2007, Filed

NOTICE: RULES OF THE THIRD CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

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JUDGES: Before: FUENTES and VAN ANTWERPEN, Circuit Judges, and PADOVA, * District Judge.

OPINION BY: VAN ANTWERPEN

OPINION: OPINION OF THE COURT

VAN ANTWERPEN, Circuit Judge.

Appellant Juan C. Espinosa brought various federal and New Jersey state law claims against his employer, Union County, alleging wrongful termination. Espinosa appeals a grant of summary judgment in favor of Union County and the denial of his Motion to Stay the Parties' Pending Cross-Motions for Summary Judgment. Union County and its Board of Chosen Freeholders appeal a grant of summary judgment in favor of Espinosa with respect to two cross-claims. For the reasons set forth below, we affirm the District Court in all respects.

I.

A. Background

Because we write solely for the parties, we set forth only those facts necessary to our analysis.

Juan C. Espinosa[1] was a corrections officer in the Union County Jail ("the Jail"). On June 18, 1995, Espinosa witnessed 25 to 30 fellow corrections officers beat, harass, and abuse Immigration and Naturalization Service ("INS") detainees who arrived at the Jail from the Esmor Federal Detention Facility.

In July 1995, after being approached by the Union County Prosecutor's Office, Espinosa agreed to assist in prosecuting those involved in the incident. Specifically, Espinosa helped prosecutors by wearing a recording device inside the Jail, obtaining documents from the Jail, and permitting the recording of all phone calls to Espinosa's residence. Espinosa also served as a witness for county prosecutors in front of grand juries and at various officers' trials.

In October 1995, after Espinosa had gathered evidence at the Jail and testified in front of a grand jury, the Prosecutor's Office acknowledged that it would be too dangerous for Espinosa to continue to work inside the Jail because of a "long history of intimidation and retaliation against corrections officers in the Union County Jail who provide information with regard to the conduct of fellow corrections officers." App. at A1541. Accordingly, the Prosecutor's Office permitted Espinosa to leave his job at the Jail, and, in exchange for his continued assistance, promised him the following: First, the County would continue to pay Espinosa his salary until the conclusion of the officers' trials. Second, the Prosecutor's Office would assist him in securing employment in the field of law enforcement in Florida by acting as a reference for Espinosa and contacting senior officials there. Finally, the County would pay Espinosa up to $ 15,000 to cover any relocation expenses that he incurred in moving to Florida. These promises were memorialized in a letter sent by Acting Prosecutor Edward M. Neafsey to Espinosa's attorney on October 16, 1995. Espinosa claims that additional oral promises regarding continued employment with the County accompanied this letter. The County and the Prosecutor's Office, however, dispute this claim.

After receiving the "Neafsey letter," Espinosa continued to help prosecutors and continued to be paid by the County. He testified in front of another grand jury in December 1995, reviewed transcripts, and testified at two criminal trials in January and March 1998. In May 1998, those convicted in connection with the incident at the Jail were sentenced and the County Prosecutor's Office no longer needed Espinosa's

assistance.

After the trials concluded, the County continued to pay Espinosa and provide him with health benefits. Espinosa remained in contact with County officials about various personnel issues, searched for a job in law enforcement, and worked full time as a security guard (for a company that began employing him in September 1996). In July 1998, Espinosa met with County officials to review his personnel file. In September 1998, Espinosa contacted Union County Manager Michael L. Lapolla to ask for a letter of recommendation, which Lapolla claims he sent.

On February 12, 1999, Espinosa accepted a job offer from the Atlanta Police Department. Two days later, on February 17, 1999, Espinosa's attorney sent a letter to Lapolla requesting a meeting, and on March 26, 1999, Espinosa and Lapolla met. The two men discussed potential job opportunities in Union County, issues surrounding Espinosa's pension, and Espinosa's concerns about accepting a job in Atlanta that paid less than he was currently receiving from Union County. At no time during this meeting did Lapolla guarantee Espinosa another position with the County.

At the time of the meeting, Lapolla knew Espinosa was still on the County's payroll. After their meeting, Lapolla claims he called the County's Director of Administrative Services and inquired as to why Espinosa was still being paid. Based on his conversation with the director, Lapolla assumed that Espinosa would shortly be taken off the County's payroll.

In August 2000, Lapolla discovered that Espinosa had not been taken off the payroll. On August 2, 2000, the County sent Espinosa a letter asking him to return to his position or resign. On August 11, 2000, Espinosa sent a letter to the County stating that he would neither report to the Jail nor resign. On August 14, 2000, the County placed Espinosa on leave without pay, continuing to provide Espinosa with health insurance.

On January 8, 2001, pursuant to New Jersey's Civil Service Act, Espinosa received a Preliminary Notice of Disciplinary Action from the County.[2] In response to this notice, Espinosa immediately sent a letter to the County requesting "a comparable position outside of the County Corrections Department." App. at A1614. Espinosa did not receive a reply to this letter. On January 19, 2001, the County held a disciplinary hearing at which Espinosa, represented by an attorney, argued that he could not return to the Jail out of concern for his own safety. The hearing officer rendered an opinion on March 27, 2001 and found that Espinosa had abandoned his job. Accordingly, the County terminated Espinosa from his position and stopped providing him health insurance.

After the hearing, the County placed a Final Notice of Disciplinary Action in Espinosa's personnel file. The notice indicated Espinosa had been terminated for the following reasons: (1) failure to perform duties, (2) insubordination, (3) inability to perform duties, (4) neglect of duties, (5) conduct unbecoming a public employee, and (6) abandonment of position. In actuality, Espinosa had only been terminated for abandonment of his position. Espinosa received a copy of this notice around the end of March and immediately objected to

the inclusion of the first five charges. County personnel promised to correct the form but did not do so until July 8, 2002, after repeated requests from Espinosa.

B. Procedural History

On August 2, 2001, Espinosa filed a twelve-count complaint in the United States District Court against Union County, the Union County Prosecutor's Office, the Policemen's Benevolent Association, and the Board of Chosen Freeholders of the County of Union. The complaint included two claims under 42 U.S.C. § 1983, one for violation of Espinosa's procedural due process rights and one for retaliation in violation of the First Amendment. He also asserted a retaliation claim under the New Jersey Conscientious Employee Protection Act ("CEPA") and the following state law claims: breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and tortious interference with prospective economic advantage.[3] The County and its co-defendants moved for summary judgment on all of Espinosa's claims and the District Court granted this motion.

The County and its co-defendants asserted counterclaims against Espinosa for breach of the implied covenant of good faith and fair dealing and unjust enrichment.[4] Espinosa moved for summary judgment on these claims and the District Court granted his motion.

Espinosa and the County and its co-defendants appeal the District Court's grants of summary judgment. Espinosa also appeals the District Court's denial of a motion under Federal Rule of Civil Procedure 56(f) by

which he sought to introduce additional evidence of the culture of retaliation inside the Jail.

II.

The District Court had subject matter jurisdiction of Espinosa's claims under 42 U.S.C. §§ 1983 and 1988 pursuant to 28 U.S.C. §§ 1331 and 1343 . The District Court had subject matter jurisdiction over Espinosa's state law claims pursuant to diversity and supplemental jurisdiction under 28 U.S.C. §§ 1332 and 1367. We have jurisdiction to review the District Courts' grant of summary judgment and its decision to deny Espinosa's Rule 56(f) motion under 28 U.S.C. § 1291.

Our review of the District Court's grant of summary judgment is plenary. *Anderson v. CONRAIL*, 297 F.3d 242, 246 (3d Cir. 2002) (citation omitted). Accordingly, "we apply the same test as the District Court should have applied initially." *Id.* That is, we will affirm the District Court's grant of summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.*" Fed. R. Civ. P. 56(c) (emphasis added). In our review, we consider the facts and any inferences that follow from them in the light most favorable to the non-moving party and we determine "whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of the evidence required by the governing law or that he did not." *Anderson*, 297 F.3d at 247 (internal quotation omitted).

"Summary judgment against a party who bears the burden of proof at trial . . . is proper . . . [only if that party] fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Anderson*, 297 F.3d at 247 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)). In this situation, "there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* (internal quotations omitted).

We review Espinosa's challenge to the District Court's denial of his Rule 56(f) motion for abuse of discretion. *See Couden v. Duffy*, 446 F.3d 483, 500 n.12 (3d Cir. 2006) (citation omitted). "An abuse of discretion occurs when a district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *Knight v. Int'l Longshoremen's Ass'n.*, 457 F.3d 331, 337 (3d Cir. 2006) (internal quotation and citation omitted).

III.

A. Retaliatory Discharge

Espinosa claims the County terminated him in retaliation for testifying against fellow corrections officers in 1998 and for expressing his concerns about the Jail's unsafe working environment in 2000. This retaliation, he asserts, violated his rights under the First Amendment and New Jersey's CEPA. Union County denies terminating Espinosa for his expression and asserts that Espinosa was fired for abandoning his

job. Because Espinosa did not produce sufficient evidence to establish a causal connection between his expression and his termination, we find he failed to establish an essential element of his case. Accordingly, we affirm the District Court's grant of summary judgment with respect to Espinosa's retaliation claims.[5]

1. First Amendment

Determining whether a public employee's expressions are entitled to protection under the First Amendment involves a three-part test derived from the Supreme Court's decisions in *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), and *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). *McGreevy v. Stroup*, 413 F.3d 359, 364 (3d Cir. 2005). We have held that an employee challenging retaliatory activity must show (1) his expression addressed a matter of public concern, (2) his interest in the expression outweighed the state's countervailing interest as an employer, and (3) his expression was a "substantial or motivating factor" in the alleged retaliatory action. *Id.* In addition, the Supreme Court, in a recent case, has held that the public employee must also be speaking as a citizen and not pursuant to his official duties. *Garcetti v. Ceballos*, - U.S. -, 126 S. Ct. 1951, 1960, 164 L. Ed. 2d 689 (2006); *see also Freitag v. Ayers*, 468 F.3d 528, 543 (9th Cir. 2006) (explaining, in the wake of *Ceballos*, "the issue is not only whether the speech in question addresses a matter of public concern, but also whether it is made as a citizen"). Generally, the first and second parts of the test involve questions of law for the court and the third part of the test involves a question of fact for the jury. *McGreevy*, 413 F.3d at 364. Despite this general rule,

summary judgment may be appropriate when a claim turns solely on the causation part of the test because "only genuine questions of fact should be determined by the jury." *Hill v. City of Scranton*, 411 F.3d 118, 127 (3d Cir. 2005).

2. Conscientious Employee Protection Act

New Jersey's CEPA forbids employers from retaliating against an employee who does any of the following:

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or another employer, with whom there is a business relationship...; or

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:...(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

N.J.S.A. § 34:19-3.

New Jersey courts have created a four-part test for evaluating CEPA claims that is very similar to the three-part test for First Amendment retaliation claims. *Caver v. City of Trenton*, 420 F.3d 243, 254 (3d Cir. 2005). An employee seeking protection under CEPA must show (1) his employer was engaged in conduct that was either unlawful or in violation of a clear mandate of public policy, (2) he performed a "whistle-blowing" activity to alert others of the improper

conduct, (3) he suffered an adverse employment action, and (4) "a causal connection exists between the whistle-blowing activity and the adverse employment action." *Id.* (citations omitted).

In evaluating whether a plaintiff's CEPA claim can survive a summary judgment motion, "the court must determine whether the plaintiff has offered sufficient evidence for a reasonable jury to find that the employer's proffered reason for the discharge was pretextual and that retaliation for the whistleblowing was the real reason for the discharge." *Blackburn v. UPS, Inc.*, 179 F.3d 81, 92-93 (3d Cir. 1999) (citation omitted).

Employees can demonstrate a causal link between protected activity and adverse employment action using circumstantial evidence. For example, the temporal proximity between the employee's expression and the adverse employment action or a "pattern of antagonism" on the part of the employer following the protected expression can raise the inference of causation. *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173, 177 (3d Cir. 1997) (citation omitted). However, "[t]hese are not the exclusive ways to show causation, as the proffered evidence, looked at as a whole, may suffice to raise the inference." *Id.* (citations omitted).

3. Analysis

Espinosa claims the County retaliated against him for his testimony against fellow officers and for objecting to the unsafe working conditions in the Union County Jail. To support his claim, Espinosa points to retaliatory

animus on the part of the County as manifested by its decision to (1) terminate him, (2) include erroneous disciplinary charges in his personnel file, and (3) file a counter-suit against him for the wages he collected after May 1998. He also points to the temporal proximity between refusal to report to the Jail and the County's stopping of his pay as evidence of causation.

The County argues Espinosa was terminated solely because he did not come to work. In support of this argument, it first points to Espinosa's own deposition, in which he admits the County would not have fired him had he returned to his job: Q. But you don't think you would have been terminated if you returned to the Union County Jail? A. No, I don't. App. at A1355. The County also cites the "Neafsey letter" of October 1995, in which prosecutors promised Espinosa that the County would continue paying his salary only until the end of the officers' trials. Finally, the County argues that there is no evidence of retaliatory animus, as the County continued to provide Espinosa with health benefits until March 2000, and delayed holding Espinosa's disciplinary hearing for nearly five months in order to give him an opportunity to resign without prejudice.

We find Espinosa failed to establish a causal link between his expressive conduct and his termination. First, Espinosa's own words undermine his retaliation claim. If what Espinosa claims was true (and the County was seeking to retaliate against him for testifying against fellow officers and objecting to the working conditions in the Jail), then it follows that the County would have terminated him on August 14, 2000 even if he would have returned to the Jail. During his

deposition, however, Espinosa admitted that he would not have been terminated had he returned to the Jail and started working on August 14, 2000. These two positions cannot be reconciled. Second, Espinosa knew in 1995 that the County intended to take him off the payroll after the conclusion of the trials because he was no longer performing any services for the County. We do not see how Espinosa can now claim the County's following through on this intention was in retaliation for his testimony. Finally, Espinosa presented no evidence supporting his claim that the County acted out of animus toward him. After the trials ended, the County provided Espinosa with a paycheck for 27 months (during which time he was collecting a paycheck from another full-time job) and health insurance for 33 months. Overall, given the evidence presented by Espinosa, we do not believe a jury could reasonably find the County terminated him in retaliation for his protected expression.

B. Procedural Due Process Violation

Espinosa also claims the District Court erred in granting summary judgment to the County and its co-defendants on his procedural due process claim under the Fourteenth Amendment. Specifically, he argues his rights were violated when the County made a variety of procedural missteps and stopped his pay without first holding a hearing. The County claims Espinosa received adequate due process and suffered no damages as a result of any mistakes. We find Espinosa's rights under the Fourteenth Amendment were not violated, as the August 2000 notice and January 2001 hearing satisfied the requirements of due process.

When a plaintiff challenges the actions of a state on due process grounds, we are obligated to make two determinations: "whether the State has deprived the claimant of a protected property interest," and "whether the State's procedures comport with due process." *Marshall v. Lauriault*, 372 F.3d 175, 185 (3d Cir. 2004) (quoting *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 195, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001)). A property interest in a public sector job arises when the employee has "a legitimate entitlement to . . . continued employment" as determined by the laws of the state in which he works. *Elmore v. Cleary*, 399 F.3d 279, 282 (3d Cir. 2005) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). In determining whether a State's procedures comported with the requirements of the Constitution, we balance (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest." *Gilbert v. Homar*, 520 U.S. 924, 931-32, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976)).

New Jersey law defines the procedural due process required before disciplinary action is taken against an employee protected by the state's Civil Service Act: "the employee shall be notified in writing and shall have the opportunity for a hearing before the appointing authority or its designated representative." N.J.S.A. § 11A:2-13. "The hearing shall be held within 30 days of the notice of disciplinary action unless waived by the employee." *Id.* New Jersey's Administrative Code

further requires that, "[w]ithin 20 days of the hearing...the appointing authority shall make a decision on the charges and furnish the employee either by personal service or certified mail with a Final Notice of Disciplinary Action." N.J.A.C. § 4A:2-2.6(d).[6]

It is undisputed that Espinosa was a civil service employee who had a property interest in his job. Accordingly, we must determine whether the procedures ultimately afforded Espinosa were constitutionally adequate.

Espinosa first argues due process principles required the County to provide him with a hearing before placing him on leave and terminating his pay on August 14, 2000. As the Supreme Court made clear in *Gilbert*, however, a temporary suspension without pay generally does not require a predeprivation hearing. *Gilbert*, 520 U.S. at 932. This is because "lost income is relatively insubstantial" as compared to the "severity of depriving someone of the means of his livelihood." *Id.* Accordingly, we do not find that the County's removal of Espinosa from its payroll without a hearing violated due process.

Even if a predeprivation hearing was not required, Espinosa argues he should have at least had a hearing promptly after the County stopped his pay on August 14, 2000. Instead, the County waited five months to hold a hearing (until January 2001) because it claimed it wanted to give Espinosa a chance to resign without the prejudice of disciplinary action.

When an employee has property interest in his job, a suspension without pay is acceptable only if "the

suspended employee receives a sufficiently prompt postsuspension hearing." *Gilbert*, 520 U.S. at 932. In this case, however, we find the delay was acceptable because Espinosa's interest in his paycheck was weak. In making this determination, we consider the following: (1) Espinosa had not performed any services for the County in over two years; (2) he agreed that he would stop receiving a paycheck and seek other work; and (3) he received over $ 100,000 from the County while working at another job on a full-time basis. Weighing Espinosa's weak interest against the County's interest in removing a non-working employee from its payroll, we find Espinosa had no basis on which he could claim he was entitled to additional payments from the County. As a result, we do not find the five month delay violated Espinosa's procedural due process rights.

Espinosa also claims the delay between his disciplinary hearing and the issuance of a decision in his case, which exceeded the time allowed by N.J.A.C. § 4A:2-2.6(d), violated his rights. We disagree. Because he had not worked for the County for over two years and had agreed to find another job, Espinosa's interest in his continued status as a County employee was weak. For this reason, the procedural protections afforded Espinosa by the County, which for the most part were consistent with the Civil Service Act, were more than sufficient.

Finally, Espinosa claims that the inclusion for 16 months of erroneous information on his Final Notice of Disciplinary Action constituted a procedural due process violation. Espinosa, however, fails to elaborate on this claim or explain how this error deprived him of a

protected property interest. Accordingly, we find this claim has no merit. [7]

C. Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing

As a County employee covered by the Civil Service Act and an agreement between the County and the Patrolmen's Benevolent Association, Union County Corrections Officers Local No. 199, Inc. ("Union Agreement"), Espinosa could only be terminated for "just cause." *See* N.J.A.C. § 4A:2-2.3; Union Agreement, App. at 1662 ("No employee shall be disciplined except for just cause."). He claims, however, the County breached the Union Agreement and the Civil Service Act when it terminated him for refusing to return to work in an environment the County knew was unsafe.[8] He further claims the County's ordering him back to an unsafe environment constituted a breach of the implied covenant of good faith and fair dealing.

The District Court mistakenly interpreted Espinosa's contract claim as identical to his CEPA claim, and, as a result, granted summary judgment in favor of the County with respect to this claim. We find, however, that Espinosa's CEPA and contract claims are not identical. His CEPA claim is based on his being fired in retaliation for his protected expression. In contrast, his contract claim is based on his being fired without "just cause," which does not require that he show retaliatory conduct on the part of the County. Although the District Court did not appropriately analyze Espinosa's contract claim, we ultimately uphold its ruling.

The County ultimately terminated Espinosa for

abandoning his job. New Jersey's Administrative Code describes job abandonment as follows: "Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing." N.J.A.C. § 4A:2-6.2.

The County agreed to continue to pay Espinosa his salary, even though he was absent from work, from the time he began assisting prosecutors in October 1995 until the conclusion of the officers' trials in May 1998. Accordingly, his absence from work during this period could not have constituted job abandonment. After May 1998, however, Espinosa did not have permission to be absent and he failed to perform any services for the County justifying compensation under his Union Agreement or the Civil Service Act. This was clearly job abandonment.

In this appeal, Espinosa essentially argues there should be an exception to the plain language of N.J. A.C. § 4A:2-6.2 permitting employees who are authorized to remain absent from work for a finite period to remain absent and on the County's payroll indefinitely. Were such an exception to exist, it would only be possible through the approval of an employee's superiors. Since neither the County nor Espinosa's superiors authorized an indefinite period of absence from work with pay and Espinosa never found another County job that would justify his being on the County's payroll, we find the County's termination of Espinosa was based on just cause and, as a result, Espinosa's contract claim must fail.

D. Fraud

Espinosa next contends the Prosecutor's Office committed common law fraud by promising him another position in the County in an effort to induce Espinosa to testify against those involved in the INS detainee abuses. We find Espinosa did not offer sufficient evidence for a reasonable jury to conclude that such a promise existed.

"A misrepresentation amounting to actual legal fraud consists of a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment." *Jewish Center of Sussex County v. Whale*, 86 N.J. 619, 432 A.2d 521, 524 (N.J. 1981) (citations omitted). Fraud claims succeed only when they are established by clear and convincing evidence. *New Jersey Econ. Dev. Auth. v. Pavonia Rest., Inc.*, 319 N.J. Super. 435, 725 A.2d 1133, 1139 (N.J. Super. Ct. App. Div. 1998).

To establish fraud on the part of the Prosecutor's Office, Espinosa must first show prosecutors promised him a job. By Espinosa's own admission in January 1998, however, no such promise was made: Q. Were you ever promised a job by anybody? A. I have not been promised a job to this day. Q. Did the Prosecutor's Office ever promise you a job? A. No, they have not. Excerpt of Trial Transcript in *New Jersey v. James Rice, et al.*, App. at A1505. In addition, the "Neafsey letter" sent to Espinosa after striking a bargain with prosecutors is explicit about a lack of a firm job offer: "we are obviously unable to guarantee [Espinosa] a

position . . . ." App. at 1542. Given Espinosa cannot establish the existence of any promise on the part of the Prosecutor's Office, his fraud claim must fail.

E. Tortious Interference with a Prospective Economic Advantage

Espinosa also claims that the Prosecutor's Office tortuously interfered with his prospective economic advantage when it suggested to County officials a way by which to terminate him. We find Espinosa did not offer sufficient evidence for a reasonable jury to conclude he had any prospective economic advantage with which the Prosecutor's Office could interfere.

To establish a claim for tortious interference with a prospective economic advantage, a plaintiff must show the following: (1) the existence of a reasonable expectation of economic advantage; (2) an intentional and malicious interference with that expectation by the defendant; (3) a causal connection between the interference and the loss of the prospective gain; and (4) damage. *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 563 A.2d 31, 37 (N.J. 1989).

Espinosa claims he had a reasonable expectation of continued payment by the County with which the Prosecutor's Office interfered. We disagree. Espinosa knew he would not be kept on the County's payroll in perpetuity: Q. After your conversation with Mr. Lapolla [in 1999,] did you understand that there was a certain timeframe to the next step in your obtaining a position within Union County? A. Well, *I understood . . . I wasn't going to be home getting paid forever.* I

understood that. I mean, there's a timeframe to everything. App. at A1329 (emphasis added). In addition, he had not performed any services for which he could expect to be paid for over two years. Given these facts, we find Espinosa did not present sufficient evidence showing a reasonable expectation of continued payment by the County.

F. Rule 56(f) *Motion*

Espinosa finally claims the District Court abused its discretion by denying his Motion to Stay the Parties' Pending Cross-Motions for Summary Judgment (under Federal Rule of Civil Procedure 56(f)), thereby prohibiting him from deposing two Union County corrections officers. These officers would have testified to the following: (1) a culture of retaliation existed inside the Jail; (2) the President of the corrections officers' union had lied under oath about the conditions Espinosa would face inside the Jail should he return; and (3) the County used payroll deductions from corrections officers' pay to support the families of corrections officers convicted of abusing the INS detainees. We find the District Court did not abuse its discretion.

Rule 56(f) permits the court to order a continuance of a motion for summary judgment "should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." Fed. R. Civ. P. 56(f). To succeed, a Rule 56(f) motion "must identify with specificity what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been

obtained." *Lunderstadt v. Colafella*, 885 F.2d 66, 71 (3d Cir. 1989) (internal quotations and citations omitted).

Espinosa fails to identify with specificity how the testimony of the two Union County corrections officers would have precluded summary judgment. The officers would have provided evidence of the union's indifference to Espinosa's plight and the dangerous prospects facing those who testify against fellow officers and return to work. Espinosa, however, had already introduced ample evidence of the union's animus towards him and the retaliation he would likely face if he returned to the Jail. Such evidence is cumulative. In addition, we have taken as true his assertion that he could not return to work. Accordingly, we find the District Court acted well within its discretion when it denied Espinosa's Rule 56(f) motion.

IV.

A. *Breach of the Implied Covenant of Good Faith and Fair Dealing*

In its counterclaim against Espinosa, the County seeks the return of over $ 150,000 in compensation provided to Espinosa between the conclusion of the officers' trials in May 1998 and Espinosa's termination in August 2000. The County claims Espinosa's retention of this compensation breaches the covenant of good faith and fair dealing associated with Espinosa's October 1995 agreement with the Prosecutor's Office. We conclude the County did not present sufficient evidence for a reasonable jury to find that Espinosa breached this covenant.

Under the covenant of good faith and fair dealing, "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Wade v. Kessler Inst.*, 172 N.J. 327, 798 A.2d 1251, 1259 (N.J. 2002) (citations and quotations omitted). However, allegations of unfair dealing may only advance upon the showing of improper motive. *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 773 A.2d 1121, 1130 (N.J. 2001). That is, the case law "note[s] a state of mind or malice-like element to breach of good faith and fair dealing, holding that the duty excludes activity that is unfair, not decent or reasonable, nor dishonest." *Id.* (citations and quotations omitted). "Without bad motive or intention, discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance." *Id.* (citations omitted).

The County contends Espinosa knew he was not entitled to payment of his salary after the conclusion of the officers' trials and he deceitfully accepted and retained them. The County further alleges that the issue of Espinosa's motivation in keeping these payments must be left to a jury. The County is correct that a defendant's motive is generally a fact question reserved for a jury. However, in order to survive a summary judgment motion, a plaintiff burdened with proving malice on the part of another party to a contract must at least proffer sufficient evidence such that a reasonable jury could return a verdict for that plaintiff. *Anderson*, 297 F.3d at 247.

In this case, the County presented no evidence that Espinosa acted out of malice. Espinosa interacted with County officials on various occasions after the

conclusion of the trials, never concealing or lying about being on the payroll. In July 1998, for example, Espinosa met with Union County officials about his personnel file. In September 1998, he contacted the County Manager for a letter of recommendation. In February 1999, he requested a meeting with the County Manager. And, in March 1999, he met with the County Manager. In addition, the County Manager knew in March 1999 that Espinosa was still on the payroll. Based on these interactions, and a lack of any evidence showing malice on the part of Espinosa, we must reject the County's contract claim.

B. Unjust Enrichment

The County also seeks return of the compensation paid to Espinosa after the trial on a theory of unjust enrichment. It argues Espinosa seeks to retain payments and benefits, provided at the taxpayer's expense, that he never should have received. We conclude the County did not offer sufficient evidence for a reasonable jury to find that Espinosa was unjustly enriched.

Unjust enrichment is the receipt of a benefit from another, the retention of which, without payment, would be unjust. *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 641 A.2d 519, 526 (N.J. 1994) (citations omitted). The unjust enrichment doctrine requires a "plaintiff [to] show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." *Id.* (citations omitted).

The County presented no evidence supporting its expectation that it was to be repaid by Espinosa. The County Manager knew Espinosa was on the County's payroll in March 1999, nearly one year after the conclusion of the trials. At that point, however, the County Manager sought only to remove Espinosa from the payroll and not the return of 10 months of his salary. The County Manager also admitted that he never asked Espinosa to return his compensation. Based on this lack of evidence, we find that the County's unjust enrichment claim must fail.

V.

For the foregoing reasons, we will affirm the District Court in all respects.

Footnotes

* The Honorable John R. Padova, District Judge of the Eastern District of Pennsylvania, sitting by designation.

n1 Espinosa's wife, Maureen Roig-Espinosa, is a co-plaintiff in this suit. For the sake of simplicity, however, we exclusively reference Mr. Espinosa as the plaintiff in our opinion.

n2 The County claims that it delayed commencing disciplinary action (from August to January) in the hope that Espinosa would resign during this time.

n3 Espinosa also brought a variety of other claims, including a substantive due process claim under § 1983, a claim for aidingand abetting a violation of the

Conscientious Employee Protection Act, and claims for constructive discharge, a state constitutional tort, intentional infliction of emotional distress, and defamation. The District Court granted summary judgment to the County with respect to these other claims and Espinosa does not raise any of them on appeal.

n4 The County also brought a conversion claim against Espinosa. The District Court granted Espinosa's summary judgment motion as to this claim and the County does not appeal its ruling.

n5 Because we can dispose of all of Espinosa's claims for failure to show causation, we need not decide whether Espinosa's refusal to return to the Jail because of its unsafe condition is expression protected under the First Amendment or CEPA.

n6 Although Espinosa was entitled to the procedures outlined in the Civil Service Act, his due process claim in this appeal is rooted in the Fourteenth Amendment.

n7 It appears that Espinosa originally brought this as a substantive due process claim. Had we analyzed the claim as such, we would have reached the same conclusion because he presents no evidence that his reputation was damaged by the inclusion of the erroneous information in his personnel file.

n8 Because we review a motion for summary judgment decided against Espinosa, we take as true his assertion that it would not have been safe for him to return to work.

01-CV-3655 (WJM)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JUAN ESPINOSA and MAUREEN ROIG-ESPINOSA, his wife,
Plaintiffs,

v.

COUNTY OF UNION, et al., Defendants. COUNTY OF UNION, et al.,
Counterclaimants,

v.

JUAN ESPINOSA and MAUREEN ROIG-ESPINOSA, his wife,
Counterclaim-Defendant.

NOTICE: NOT FOR PUBLICATION

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For POLICEMEN'S BENEVOLENT ASSOCIATION UNION COUNTY CORRECTIONS OFFICERS

LOCAL # 199, INC., Defendant: MICHAEL A. BUKOSKY, LOCCKE & CORREIA P.A., HACKENSACK, NJ.

For JAMES J. DURKIN, individually and in his official capacity, THEODORE J. ROMANKOW, UNION COUNTY PROSECUTOR in his official capacity, and his predecessors and successors also known as THEODORE J. ROMANLOW, THOMAS K. ISENHOUR, individually and in his official capacity, Defendants: MARK STEWART KUNDLA, MICHAEL T. COONEY, HARDIN, KUNDLA, MCKEON, POLETTO & POLIFRONI, PC, SPRINGFIELD, NJ.

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For DIRECTOR JAMES E. COLEMAN, JAMES F. DOUGHERTY, JR., HAROLD GIBSON, Defendants: KATHRYN V. HATFIELD, SCHENCK, PRICE, SMITH & KING, LLP, MORRISTOWN, NJ.

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JUDGES: WILLIAM J. MARTINI, U.S.D.J.

OPINION BY: WILLIAM J. MARTINI

OPINION: MARTINI, DISTRICT JUDGE:

I) BACKGROUND

Plaintiff Juan Espinosa has brought this action alleging a violation of his *First* and *Fourteenth Amendment* rights, in addition to various state law claims[1], as a result of being terminated from his position with the Union County jail. Defendants filed three counterclaims, including (1) breach of the implied covenant of good faith and fair dealing, (2) conversion, and (3) unjust enrichment.

Plaintiff was employed by the Union County jail from 1982 to 1984 and again from 1988 to 2001. (Defendants' Statement of Undisputed Fact PP2-7; 147) (hereinafter "Def.'s SOF.") On June 18, 1995, plaintiff observed 25 to 30 fellow Union County correction officers beat, harass and abuse INS detainees that were transferred from the Esmor Detention Facility. (*Id.* at P30.) Plaintiff did not report the incident to anybody other than his superior Lieutenant Salay, who responded he "didn't care."[2] (*Id.* at P52.) In July 1995, the prosecutor's office contacted Espinosa for his

assistance in conducting an investigation, to which he agreed to provide oral testimony before a grand jury upon issuance of a subpoena but refused to give a written statement. (Plaintiff's Statement of Undisputed Fact PP6-8) (hereinafter "Pl.'s SOF.") During his first meeting with the prosecutor's office, Luitenant Durkin informed plaintiff he was aware of the Esmor incident and knew plaintiff had witnessed the event. (Def.'s SOF P61.) The prosecutor's office explained to Espinosa that all individuals who cooperated would be granted immunity. Espinosa testified before the grand jury on August 9, 1995 and December 29, 1995. (*Id.* at P67; Hatfield Aff., Exh. G.) He also wore a wiretap inside the jail to obtain additional evidence, had a tape recording machine installed in his home to record incriminating phone calls, and obtained documents from the jail. (Pl. SOF PP11-13.) Twelve corrections officers were indicted in January 1996. (*Id.* at P21.) The first trial took place over a nine week period from January to March 1998 and the second trial commenced in March 1998. Espinosa testified at both trials. Of the twelve corrections officers indicted, ten were either convicted or plead guilty. (*Id.* at P24.)

After the first arrests were made in October 1995, plaintiff and the prosecutor's office mutually agreed to remove plaintiff from the jail in order to ensure safety. (*Id.* at P17.) Acting Prosecutor Edward M. Neafsey sent a letter (hereinafter "Neafsey letter")[3] dated October 16, 1995 to Espinosa's attorney, Robert Norton, detailing the prosecutor's office's commitments to plaintiff in exchange for his cooperation. This letter stated that the prosecutor's office intended that plaintiff would not suffer financially or professionally as a result of his cooperation and contained three

promises: (1) assistance in securing employment in Florida, (2) payment of his salary by Union County through the duration of the trials, and (3) payment of up to $ 15,000 in moving expenses. (Shea Certif., Exh. P.) The letter further stated that continued employment with the jail was impossible. (*Id.*) Plaintiff claims that various oral promises of continued employment with the County accompanied this written letter, but were not included as this letter would be used for impeachment purposes at trial. Such oral promises consist of the "possibility of a transfer" to the Auto Task Force, the Narcotics Strike Force, and the Juvenile Detention Center. (Plaintiff's Brief in Opposition at 40-41.) At best, these oral representations appear to be gratuitous remarks to look into the possibility of other employment within the County. Additionally, this letter contained a promise to communicate plaintiff's integrity with regard to his participation in the Esmor investigation and trial. (*See* Neafsey Letter, Shea Certif., Exh. P.) It, however, does not promise his full personnel file and employment history would be concealed in the event of an inquiry.

At the conclusion of the trials in May 1998, plaintiff contacted Durkin to discuss further employment with the County, who informed plaintiff to see the director of the jail to explore other law enforcement positions. Plaintiff chose not to follow Durkin's advice, claiming he feared returning to the jail. Notably, all other officers that testified during the trial, one of which also wore a wire inside the jail to assist in the investigation, returned to work immediately after testifying. (Def.'s SOF PP85-87.) While plaintiff was a key witness in the Esmor trials, he was not the sole witness. Plaintiff, however, did contact County Manager Michael Lapolla

on June 3, 1998 to set-up a meeting to discuss certain problems with plaintiff's personnel file. (*Id.* at SOF P89.) On June 9, 1998, plaintiff again spoke with Lapolla regarding his file, at which point plaintiff claims Lapolla advised him that his personnel file would be purged of any derogatory information. (*Id.* at P90.)

Around February 1999, plaintiff was offered and accepted a position with the Atlanta Police Department. [4] (*Id.* at P96.) Norton then contacted Lapolla by letter on February 17, 1999 to coordinate a meeting between Lapolla and Espinosa. (*Id.* at P97.) A meeting was scheduled for March 26, 1999, in which plaintiff and Lapolla generally discussed employment options within the County and plaintiff expressed a desire to stay in the same pension system in which he was already enrolled. (*Id.* at P101.) Plaintiff admitted that Lapolla at no point promised him a job; however, claims that Lapolla discussed the possibility of a lump sum settlement and assured plaintiff he would continued to be paid. (*Id.* at PP104; 107-108.) At that meeting, plaintiff informed Lapolla he had received and accepted an offer with the Atlanta Police Department, but was concerned about the low salary. After the meeting, plaintiff advised the Atlanta Police Department he would not take the job; however, he failed to inform Lapolla that he declined the position. (*Id.* at P109.)

In the summer of 2000, Lapolla was informed that plaintiff was still on payroll. Believing plaintiff had taken the Atlanta job, he directed Harold Gibson, the Director of the Department of Public Safety, to send a letter (dated August 2, 2000) to plaintiff requesting he return to the jail on August 14, 2000 or resign. (*Id.* at PP121-122.) This letter required plaintiff to perform

some affirmative action in order to maintain employment with the County. Instead, plaintiff's attorney at the time, Rafael Betancourt, acknowledged receipt of the August 2, 2000 letter, and sent a letter in response on August 11, 2000 advising that plaintiff would not resign, report to duty or abandon his position. (*Id.* at P128.) At this point, plaintiff had placed defendants in an impossible position, and defendants could have done nothing more than institute termination proceedings. Plaintiff failed to return to work on August 14, 2000, and received his last paycheck in August 2000. (*Id.* at P129.) The County paid plaintiff his salary for over two years after the conclusion of the trials, which appears to be an oversight on the County's part.

From September 2000 to January 2001, plaintiff was considered by the County on an unpaid leave of absence. (*Id.* at P130.) In January 2001, the County instituted formal disciplinary proceedings. The County served a preliminary notice of disciplinary charges on January 8, 2001 that contained six separate charges and provided a hearing would be held on January 19, 2001. (*Id.* at PP131-134.) Norton contacted Frank Capece, County's personnel counsel, by letter on January 17, 2001 requesting plaintiff be transferred to another position in the County. (*Id.* at P135.) On January 19, 2001, an administrative hearing was held before the Honorable Frederic R. McDaniel. (*Id.* at P141.) After a few requests from plaintiff, a report and recommendation was issued on March 27, 2001 concluding that plaintiff be terminated effective August 14, 2000 for abandoning his position. All other charges were dismissed. (*Id.* at PP147-148.) Lapolla accepted the report and recommendation and a Final Notice of

Disciplinary Action was sent to plaintiff on March 27, 2001. This notice mistakenly contained all six disciplinary charges. (*Id.* at PP147-148.) The County issued a revised Final Notice of Disciplinary Action containing only the charge of abandonment sixteen months after the original notice was issued. (*Id.* at P154.) Plaintiff filed an appeal to the Merit Systems Board on April 12, 2001, but voluntarily withdrew it on May 13, 2002. Plaintiff filed this complaint on August 2, 2001. (*Id.* at PP157-159.)

II) STANDARD OF REVIEW

Summary judgment eliminates unfounded claims without recourse to a costly and lengthy trial. *See Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).* However, a court should grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c).* The burden of showing that no genuine issue of material fact exists rests initially on the moving party. *See Celotex, 477 U.S. at 323.* A litigant may discharge this burden by exposing "the absence of evidence to support the nonmoving party's case." *Id. at 325.* In evaluating a summary judgment motion, a court must view all evidence in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976).*

Once the moving party has made a properly supported motion for summary judgment, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The substantive law determines which facts are material. *Id. at 248*. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* No issue for trial exists unless the nonmoving party can demonstrate sufficient evidence favoring it such that a reasonable jury could return a verdict in that party's favor. *See id. at 249*.

III) DISCUSSION

A) *Section 1983* Claims

In order to maintain a claim under *42 U.S.C. § 1983*, plaintiff must first establish he was deprived of a right protected by the Constitution, and then show the individuals who deprived him of that right were acting under the color of state law. *Salerno v. O'Rourke, 555 F. Supp. 750, 755 (D.N.J. 1983)* (citing *Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405, (1976)*; *Reid v. Barrett, 467 F. Supp. 124, 126 (D.N.J. 1979))*. Plaintiff maintains three claims pursuant to *§ 1983*: (1) a violation of substantive due process, (2) a violation of procedural due process, and (3) *First Amendment* retaliation. This Court finds that plaintiff has failed to establish he was deprived of a constitutionally protected right under any of these claims.

(i) Count V--Substantive Due Process Violation/Property Rights

Both plaintiff and defendant moved for summary judgment with regard to a violation of due process. Plaintiff contends that defendants violated substantive due process through injury to plaintiff's reputation, and procedural due process by terminating plaintiff without providing due pocess. Defendants argue there is no substantive due process protection for injury to reputation and the procedures provided plaintiff were adequate process.

Defendant's raise and this Court notes that the first time a procedural due process claim was raised was in the plaintiff's brief in support of their motion. While plaintiff maintains that the complaint contains various due process violations, the Fifth Count of the complaint very specifically refers to "substantive due process" and is devoid of "procedural due process." That being said, this Court will go forth and address said argument as there has been discovery on the termination procedures and defendants have made an argument addressing the merits of it.

(a) Substantive Due Process

In the Third Circuit, not all rights that are afforded procedural due process are afforded substantive due process. *Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118, 123 (3d Cir. 2000).* If the interest is of the like that is protected by the substantive *due process clause of the Fourteenth Amendment,* "'then substantive due process protects the plaintiff from arbitrary or irrational deprivation regardless of the adequacy of procedures used.'" *McCullough v. City of Atlantic City, 137 F. Supp.2d 557, 565 (D.N.J. 2001)* (quoting *Nicholas v. Pennsylvania State University, 227 F.3d 133, 139 (3d Cir. 2000)).* Where the matter contains

allegations of abusive executive action, it has been held that only the most egregious conduct will be considered arbitrary. *Boyanski v. Capital Area Intermediate Unit, 215 F.3d 396, 400 (3d Cir. 2000).*

Plaintiff argues a violation of substantive due process as a result of damage to his reputation that occurred during his termination and resulted in the loss of future employment opportunities. Injury to reputation alone is not an interest protected by the due process clause; rather, plaintiff must claim he suffered some additional deprivation. *Kelly v. Sayreville, 107 F.3d 1073, 1077-1078 (3d Cir. 1997).* In order to have a liberty interest in his reputation, plaintiff must establish (1) he was terminated, and (2) charges were sustained against him during his termination that damaged his standing in the community or imposed a stigma such that future employment is precluded. *Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).* Plaintiff maintains that an injury to his reputation occurred during his termination proceedings that resulted in the loss of future employment.

To determine whether plaintiff has a constitutionally protected interest under substantive due process, this Court must next consider whether a genuine issue of material fact exists as to actual damage to plaintiff's reputation. "For government action to infringe the 'reputation, honor, or integrity' of an individual, that government action first must involve a publication that is substantially and materially false." *Ersek v. Township of Springfield, 102 F.3d 79, 83-84 (3d Cir. 1996)* (citing *Codd v. Velger, 429 U.S. 624, 627-29, 51 L. Ed. 2d 92, 97 S. Ct. 882 (1977);Fraternal Order of Police Lodge No. 5 v. Tucker, 868 F.2d 74, 82 (3d Cir.*

1989)). Plaintiff must show the "allegedly stigmatizing information was published or otherwise disseminated by his government employer to the public." *Chabal v. Reagan, 841 F.2d 1216, 1223 (3d Cir. 1988)* (citing *Bishop v. Wood, 426 U.S. 341, 348, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976))*. Merely showing that such information is contained within a personnel file is insufficient to demonstrate publication and defeat a motion for summary judgment. *Copeland v. Phila. Police Dep't, 840 F.2d 1139, 1148 (3d Cir. 1988)*. Additionally, difficulty in finding employment is also insufficient to prove this information has been communicated to others. *See Chabal, 841 F.2d at 1223*.

Plaintiff has not demonstrated that his personnel file or any of the information resulting from his termination was made public. He simply claims that false charges appeared in his personnel file, and he had difficulty obtaining employment. Plaintiff has not shown a government action that involved the publication of substantially false information. Therefore, no protected substantive due process interest has been established, thus this Court need not determine whether the hearing provided was sufficient. Summary judgment is granted in favor of the defendants.

(b) Procedural Due Process

In order to establish a violation of procedural due process pursuant to a dismissal from public employment, it must be shown that: (1) the dismissal deprived plaintiff of a property or liberty interest, and (2) adequate procedural protections were not provided. *Richardson v. Felix, 856 F.2d 505, 507 (3d Cir. 1988)*. "To have a property interest in a job, a person must

have more than a unilateral expectation of continued employment; he must have a legitimate entitlement to it." *Chabal, 841 F.2d at 1223.* The property interest must have an independent source of entitlement found in State law. *McKeever v. Township of Washington, 236 F. Supp.2d 400, 404 (D.N.J. 2002)* (citing *Bishop v. Wood, 426 U.S. 341, 344, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976)).* An employee with a protected interest in his employment must be provided a notice of the charges and a hearing prior to being terminated. *Id.*

Plaintiff maintains that as a tenured official he has a property interest in his employment as established in *N.J.S.A. 40A:14-147,* which states in pertinent part:

> no member or officer of the police department or force shall be removed from his office, employment or position for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations established for the government of the police department and force, nor shall such member or officer be suspended, removed, fined or reduced in rank from or in office, employment, or position therein, except for just cause as hereinbefore provided and then only upon a written complaint setting forth the charge or charges against such member or officer.

It is clear that this statute provides a property interest for members or officers of the police department, and does not include correction officers. Further, it has been determined that this statute applies to police officers in civil service municipalities who face charges of minor

discipline. *FOP Lodge # 1 v. City of Camden Police Dep't, 368 N.J. Super. 56, 845 A.2d 192, 196 (N.J. Super. Ct., Law Div. 2003). See also Goodman v. Department of Corrections, Central Reception and Assignment Facility, 367 N.J. Super. 591, 844 A.2d 543, 546 (N.J. Super. Ct., App. Div. 2004)* (applying *N.J.S.A. 11A:2-13* rather than *N.J.S.A. 40A:14-147* because plaintiff was a corrections officer and not a police officer).

However, a review of New Jersey's Civil Service Act, *N.J.S.A. 11A:1-1 et seq.*, evidences a possible vehicle through which plaintiff could be afforded a legitimate property interest in his employment. It provides that "before any disciplinary action [] is taken against a *permanent employee* [] the employee shall be notified in writing and shall have an opportunity for a hearing" (emphasis added). *See N.J.S.A. 11A:2-13.* Thus, employees of permanent status cannot be discharged or demoted without cause and are entitled to a pre-termination hearing and appeal. *Farber v. City of Paterson, 327 F. Supp. 2d 401, 408 (D.N.J. 2004).* However, employees appointed to their positions provisionally are not afforded these same protections. *Id.* Indeed, provisional employees may be terminated at any time at the discretion of the employer. *Id.* (citing *Williams v. Civil Serv. Comm'n, 66 N.J. 152, 329 A.2d 556, 558 (N.J. Sup. Ct. 1974);Grexa v. State, Dep't of Human Services, 168 N.J. Super. 202, 402 A.2d 938, 941 (N.J. Super. Ct., App. Div. 1978)).* In order to become a permanent employee, four things must occur: (1) the employee must pass the civil service examination, (2) the employee must be placed on a list of eligible candidates, (3) the Commissioner must certify the three eligible persons who received the highest rankings on the list, and (4) the appointing authority must choose

that employee and appoint them permanently to their position. *Farber, 327 F. Supp.2d at 409.*

Plaintiff has failed to provide this Court with evidence supporting a finding that he is a permanent employee. While he makes a bare assertion that he was a tenured employee, plaintiff fails to provide evidence to support such an assertion. Conclusory statements cannot be the basis of evidentiary support for a summary judgment motion. *See Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990).* More importantly, plaintiff maintains that he was promoted to Sergeant *provisionally.* (Pl.'s SOF P2.) Although plaintiff took and passed the civil service examination, plaintiff ranked 34 on the list and did not receive permanent placement and remained a provisional employee. (Hatfield Aff., Exh. A., Espinosa Dep. 337:3-338:25.) Therefore, plaintiff had no entitlement to continued employment and is not afforded the protections of procedural due process.

Even if plaintiff had established he has a legitimate property interest in his employment, the procedures afforded by the County comported with the requirements of due process. Plaintiff was notified of the various charges against him, and then provided a full opportunity to be heard. Plaintiff argues that the three month lag between his removal from payroll and the notice and hearing violated his due process rights. He also contends that the approximate fifty day delay between the date the report and recommendation should have been issued and was actually issued was in contravention to N.J.A.C. 4A:2-2.6(d) requiring an issuance of findings within 20 days of the hearing, and resulted in a violation of procedural due process. Taking both delays into consideration, this Court still concludes

plaintiff was afforded adequate process. Regarding plaintiff's termination hearing, the delay occurred because plaintiff was initially placed on an unpaid leave of absence in an attempt to avoid formal disciplinary charges, an action in plaintiff's favor. Ultimately, plaintiff was provided with notice and a hearing prior to being terminated. As to the delay with the issuance of the report and recommendation, this delay was not egregious and did not result in a violation of due process. *See Goodman, 844 A.2d at 546, 548* (noting that the delay was not egregious and that time limitations with regard to disciplinary hearings were not intended to be technical impediments to a resolution of charges of misconduct). Thus, summary judgment is granted in favor of defendants.

(ii) Count IV--*First Amendment* Retaliation

Again, both plaintiff and defendants filed a motion for summary judgment regarding the claim of *First Amendment* retaliation. "The *First Amendment* protects statements by public officials on matters of public concern." *McCullough v. City of Atlantic City, 137 F. Supp.2d 557, 566 (D.N.J. 2001)* (citing *Pickering v. Board of Educ., 391 U.S. 563, 573, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)*). Unlike the *Fourteenth Amendment*, a *First Amendment* retaliation claim is not dependant upon a liberty or property interest. *McCullough, 137 F. Supp.2d at 566.* A three-step process is followed in analyzing a claim of retaliation under the *First Amendment. Id.* First, plaintiff must prove that he engaged in protected speech. *Green v. Philadelphia Hous. Auth., 105 F.3d 882, 885 (3d Cir. 1997).* Second, plaintiff must prove the protected activity was a substantial or motivating factor in the alleged retaliatory action. *Id.* Third, the employer can then

rebut plaintiff's claim by demonstrating it would have reached the same decision in the absence of the protected conduct. *Brennan v. Norton, 350 F.3d 399, 414 (3d Cir. 2003).* Defendants do not contest that plaintiff engaged in a protected activity. Therefore, the crux of this discussion will be based on whether plaintiff has satisfied his burden of showing the protected speech was a substantial motivating factor in his termination.

Plaintiff asserts that it was not safe for him to return to the jail as a result of his participation and testimony in the Esmor trials, thus defendants' request for his return to work is a *First Amendment* retaliation. Defendants maintain that plaintiff failed to carry his burden of showing the protected speech was a motivating factor in his termination. They argue he was terminated four years after his grand jury testimony and over two years after his trial testimony. In addition, defendants maintain that Espinosa conceded he would not have been terminated had he not abandoned his job. This Court agrees with defendants' position, and finds plaintiff's argument to be illogical for the following reasons.

"A public employer 'adversely affects an employee's *First Amendment* rights when it refuses to rehire an employee because of the exercise of those rights or when it makes decisions, which relate to promotion, transfer, recall and hiring, based on the exercise of an employee's *First Amendment* rights.'" *Brennan, 350 F.3d at 419.* Plaintiff had abandoned his position for a period over two years prior to being terminated. Despite plaintiff's agreement with defendants that he would be paid only through the conclusion of the trials, defendants continued to pay plaintiff for this entire

period. Further, plaintiff failed to contact defendants regarding other potential employment in the County until one year after the Esmor trials concluded, at which time he was provided an opportunity to meet with Lapolla. (Def.'s SOF PP97, 100.) Plaintiff also testified at his deposition that he would not have been terminated had he not abandoned his position and knew he would not get paid forever to stay home. (*Id.* at PP111, 176.) After two and a half years, plaintiff was requested to either return to work or resign, and when neither was done, defendants terminated plaintiff. (*Id.* at PP125-129.)

There is a lack of evidential support that defendants' motives in terminating plaintiff were in retaliation to providing testimony against various corrections officers involved in the Esmor incident. Indeed, the evidence presented to this Court support a conclusion to the contrary. It is apparent to this Court that defendants' were not acting in retaliation to plaintiff's testimony, thus summary judgment is granted in favor of defendants.

B) Count I--CEPA

Again, both plaintiff and defendant have filed for summary judgment regarding the violation of New Jersey's Conscientious Employee Protection Act (hereinafter "CEPA"). Plaintiff contends that the termination of his employment was clearly in violation of CEPA as a result of his participation in the Esmor investigation and trials. Defendants contend that plaintiff was terminated as a result of abandonment, thus plaintiff cannot maintain a claim of retaliation.

New Jersey's CEPA statute provides that:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following
>
> ***
>
> b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer or another employer with whom there is a business relationship; or
>
> c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> ***
>
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

N.J.S.A. 34:19-3. CEPA is a remedial statute that should be construed liberally to achieve its remedial purpose. *McCullough, 137 F. Supp.2d at 572-573.* Plaintiff argues a CEPA violation pursuant to two theories: (1) defendants retaliated against plaintiff for his testimony in the Esmor trials by terminating plaintiff when it was unsafe for him to return to the jail, *N.J.S.A. 34:19-3b*; and (2) defendants retaliated against plaintiff when terminating him for refusing to return to work because he believed the unsafe work environment was in violation of public policy, *N.J.S.A. 34:19-3c.* Both

claims are analyzed the same under CEPA, thus they will be discussed together. *Costello v. City of Brigantine, 2001 U.S. Dist. LEXIS 8687, *31 (D.N.J. 2001).*

In order to establish a claim of CEPA, plaintiff must make out a *prima facie* case of retaliatory action. *McCullough, 137 F. Supp.2d at 573.* To satisfy this burden, plaintiff must show that: (1) he believed his employer's conduct violated either a law, or rule or regulation; (2) he either (a) disclosed or threatened to disclose the activity, or (b) objected to or refused to participate in the activity; (3) retaliatory action was taken against him; and (4) a causal connection between the whistle-blowing activity and the adverse employment action. *Costello, 2001 U.S. Dist. LEXIS 8687 at *31.* Once plaintiff meets the *prima facie* burden, defendant must articulate a legitimate, nondiscriminatory reason for making the adverse employment decision. *McCullough, 137 F. Supp.2d at 573.* The burden then shifts back to plaintiff to raise an issue of fact as to whether defendant's explanation is pretextual or whether retaliatory discrimination was more likely than not a determinative factor in the decision. *Id.* "The employee need not submit direct evidence of discrimination, but must only raise a genuine issue of fact suggesting pretext by providing some evidence establishing a reasonable inference that the employer's proffered reason for the decision was weak, implausible, inconsistent, incoherent or contradictory so as to be unworthy of credence." *Id.* (citing *Bowles v. City of Camden, 993 F. Supp. 255, 262 (D.N.J. 1998).*

Defendants argue that plaintiff failed to causally connect the whistle-blowing activity to the termination,

thus he has not made out a *prima facie* case of CEPA.[5] Specifically, defendants argue that causation is lacking as over two years have lapsed between the testimony and the termination. Additionally, defendants contend that plaintiff was terminated as a result of abandoning his position. This Court agrees that plaintiff has failed to make out a *prima facie* case of CEPA.

Plaintiff contends that defendants' order for plaintiff to resign or return to the jail when they knew plaintiff would never return was an act in retaliation to plaintiff testifying. In addition, plaintiff argues that termination for his refusal to return to work because he believed the unsafe work environment was in violation of public policy is retaliatory conduct in violation of CEPA. As already noted by this Court, these arguments are illogical. The various facts of this case do not sustain the causal connection required to maintain a CEPA cause of action. As noted in the *First Amendment* section, *infra*, plaintiff had abandoned his position for a period over two years, for which he was paid. Further, after this time had lapsed, defendants requested plaintiff return to his position or resign. Plaintiff having done neither, defendants terminated plaintiff. It is rather clear to this Court that plaintiff was terminated for abandoning his position and not in retaliation for his testimony. For a more complete discussion, see Section (A)(ii) *infra* discussing *First Amendment* retaliation.

C) Count II-Aiding and Abetting a Violation of CEPA

Defendants also argue summary judgment as to the aiding and abetting claim should be granted because there is no such cause of action. Plaintiff maintains this is a valid cause of action because New Jersey's Law

Against Discrimination (hereinafter "LAD") is the basis of the legal framework for CEPA, and LAD provides a cause of action for aiding and abetting. *Failla v. Passaic, 146 F.3d 149, 158 (3d Cir. 1998).*

However, LAD is distinguishable from CEPA in that individual liability for a LAD claim must be predicated on aiding and abetting, otherwise there is no claim against an individual. *Kennedy v. Chubb Group of Ins. Cos., 60 F. Supp.2d 384, 390 (D.N.J. 1999)* (citing *Hurley v. Atlantic City Police Dep't., 174 F.3d 95, 125 (3d Cir. 1999)).* Conversely, CEPA creates a cause of action against individual defendants. *Espinosa v. Continental Airlines, 80 F. Supp.2d 297, 305 (D.N.J. 2000).* Further, it has been determined that while LAD does create a separate cause of action for aiding and abetting, CEPA is not similarly written and creates its own separate cause of action to hold individuals liable. *Id.* Plaintiff has failed to provide any legal authority creating a claim for aiding and abetting, thus summary judgment is granted.

D) Counts Subsumed Under CEPA

Defendants next seek summary judgment for five of plaintiff's state law claims based upon CEPA's waiver provision. For some of these claims, defendants also provide alternative theories upon which they assert summary judgment should be granted. Additionally, plaintiff seeks summary judgment for the breach of contract claim as well. All arguments pursuant to these claims will be discussed in this section.

Under the CEPA waiver provision, "the institution of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State

law, rule or regulation or under the common law." *N.J.S.A. 34:19-8.* Defendants allege plaintiff's institution of his CEPA claim results in the following counts being waived: (1) Count III alleging constructive discharge; (2) Count VI alleging a state constitutional tort for violation of freedom of speech and injury to reputation; (3) Count VII alleging breach of contract and the implied covenant of fair dealing; (4) Count VIII alleging violation of New Jersey public policy; and, (5) Count X alleging intentional infliction of emotional distress. Plaintiff concedes that both his state constitutional tort claim regarding freedom of speech and his New Jersey Public Policy claim are waived under the CEPA waiver provision, thus these claims will not be discussed any further herein.

"The unambiguous language of the New Jersey provision indicates that by filing a claim under CEPA, a plaintiff waives his or her right to assert claims for the same conduct." *Palladino ex rel. United States v. VNA of S. N.J., Inc., 68 F. Supp. 2d 455, 470 (D.N.J. 1999).* The waiver provision applies to claims that are "substantially related" to the CEPA claim. *Bowen v. Parking Auth. of Camden, 2003 U.S. Dist. LEXIS 16305, at *87 (D.N.J. 2003)* (citing *Young v. Schering Corp., 275 N.J. Super. 221, 238, 645 A.2d 1238 (App. Div. 1994), aff'd, 141 N.J. 16, 31, 660 A.2d 1153 (1995)).* It includes all rights and remedies that are available when an employee is wrongfully discharged for disclosure, in an attempt to prevent multiple claims based upon the same issue. *Young, 141 N.J. at 29-30.* Conversely, claims that do not require a showing of retaliation and require a showing of different proofs are not waived by the institution of the CEPA claim. *Kadetsky v. Egg Harbor Twp. Bd. of Educ., 82 F. Supp.*

2d 327, 342 (D.N.J. 2000) (citing *Young, 141 N.J. at 32*). The waiver provision applies to claims upon the institution of a CEPA claim, therefore a claim will not be saved merely because a court dismisses the underlying CEPA claim. *Lynch v. New Deal Delivery Serv., 974 F. Supp. 441, 456 (D.N.J. 1997)* (citing *Flaherty v. The Enclave, 255 N.J. Super. 407, 414, 605 A.2d 301 (Law. Div. 1992)).*

(i) Count III--Constructive Discharge Claim

Defendants argue that summary judgment should be granted as to the constructive discharge claim because it is waived under CEPA, or alternatively the claim should be dismissed because Plaintiff did not resign from his position. Plaintiff alleges defendants constructively discharged him by requiring him to work in a dangerous work environment, refusing to transfer him, and bringing disciplinary charges resulting in his termination when he refused to return. Plaintiff's constructive discharge claim is waived because this claim is substantially similar to plaintiff's CEPA claim as both are based upon the same facts regarding the work environment of the jail.[6] Thus, this claim is not factually independent of the CEPA claim and is waived.

(ii) Count VI--State Constitutional Tort/Violation of Freedom of Speech

Defendants next argue summary judgment should be granted as to the violation of the New Jersey Constitution for injury to plaintiff's reputation because it is waived under CEPA, and alternatively plaintiff received adequate due process. In addition to the freedom of speech claim, plaintiff asserts a state constitutional tort claim that includes a claim for injury to his reputation. As previously noted, the freedom of

speech claim was voluntarily dismissed; therefore, this discussion will focus on his reputation argument. This claim is not waived under CEPA because it contains an analysis of facts independent of the retaliation claim since this alleged injury occurred after the retaliatory events, thus it will be discussed under defendant's alternative argument.

The analysis of injury to reputation under the New Jersey Constitution differs from that under the Federal Constitution only to the extent that an injury to one's reputation is protected without requiring any other tangible property loss. *Doe v. Poritz, 142 N.J. 1, 662 A.2d 367, 419 (N.J. Sup. Ct. 1995).* This Court dismisses plaintiff's state constitutional claim pursuant to injury to reputation for the same reasons as set forth in the substantive due process analysis. As this Court held there, plaintiff has failed to show a government action resulting in the publication of substantially false information. Because plaintiff has not carried this burden, this Court need not reach the sufficing nature of the hearing provided by defendants Since this analysis is identical to the analysis under the *Fourteenth Amendment*, see the discussion in Section (A)(i)(a) *infra* denying Plaintiff's federal substantive due process claim.

(iii) Count VII-Breach of Contract and the Implied Covenants of Good Faith and Fair Dealing

Both defendants and plaintiff contend summary judgment should be granted in their favor as to the breach of contract and the breach of the implied covenants of good faith and fair dealing. Plaintiff's claim is based upon violations of the Collective Bargaining Agreement that is in place between the County of

Union and the Policemen's Benevolent Association Union County Corrections Local # 199, Inc. Plaintiff asserts summary judgment should be granted because defendants committed a breach of contract and a breach of the implied covenant of good faith and fair dealing when they terminated him for refusing to return to the jail. Defendants argue summary judgment is appropriate because plaintiff's claim is barred by the waiver provision in CEPA, or alternatively plaintiff is precluded from bringing the claim since he did not exhaust administrative remedies.

Plaintiff's breach of contract claim is based on termination without just cause and an unsafe work environment, both of which require the provision of evidence identical to that needed to prove retaliation under CEPA. *See Bowen, 2003 U.S. Dist. LEXIS 16305 at *138.* Thus, these claims are substantially related and summary judgment is granted in favor of defendant.

(iv) Count X-Intentional Infliction of Emotional Distress Claim

Defendants also assert summary judgment should be granted as to intentional infliction of emotional distress pursuant to the CEPA waiver provision, or alternatively because plaintiff's allegations do not constitute "severe emotional distress" and defendant's conduct does not rise to the level of "outrageous conduct." Plaintiff claims his emotional distress was caused by defendants retaliating against him and threatening him and his family with bodily harm and death, demanding he return to a dangerous work environment, refusing to transfer him, filing disciplinary charges against him, terminating his

employment, and refusing to remove certain disciplinary charges from his personnel file.

Plaintiff's allegations regarding all conduct occurring up to and including terminating his employment require a showing of the very "same conduct" plaintiff's CEPA claim is based upon. *See Palladino, 68 F. Supp. 2d at 470 (D.N.J. 1999).* When an emotional distress claim is linked to plaintiff's termination, it is waived under CEPA. *See Lynch, 974 F. Supp. 441, 456 (D.N.J. 1997).* Thus, these claims are dismissed as waived. However, the refusal to remove disciplinary charges from his file is distinct conduct that is not waived by the CEPA claim; therefore, defendants' alternative argument will be discussed.

To establish a claim for intentional infliction of emotional distress under New Jersey law, plaintiff must show there was "intentional and outrageous conduct by the defendant, proximate cause, and distress that [was] severe." *Buckley v. Trenton Sav. Fund Soc'y, 111 N.J. 355, 544 A.2d 857, 863 (N.J. Sup. Ct. 1988).* For conduct to qualify as outrageous, it must "'go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Id.* (citing *Restate (Second) of Torts § 46*). "This tort 'tolerates many kinds of unjust, unfair and unkind conduct,' and it is 'extremely rare to find conduct in the employment context which will rise to the level of outrageousness necessary to provide a basis for recovery.'" *Mosley v. Del. River Port Auth., 2000 U.S. Dist. LEXIS 22402 (D.N.J. 2000)* (citing *Fregara v. Jet Aviation Business Jets, 764 F. Supp. 940, 956 (D.N.J. 1991)).* Courts routinely hold that claims involving employment decisions do not as a matter of law state a claim for intentional infliction of emotional distress. *Witherspoon*

v. Rent-A-Center, Inc., 173 F. Supp. 2d 239, 242 (D.N.J. 2001).

Plaintiff's intentional infliction of emotional distress claim cannot be sustained under the allegation that defendants failed to remove the disciplinary charges since this does not amount to outrageous conduct. The failure to amend a person's personnel record is not "utterly intolerable in a civilized community." *Buckley, 544 A.2d at 863.* Therefore, defendants' conduct was not "outrageous" and summary judgment is granted.

E) Count XII-Fraud

Defendants claim summary judgment should be granted as to plaintiff's fraud claim because plaintiff has offered no evidence to show that he was promised continued employment with Union County. Plaintiff claims that the defendants[7] committed fraud and induced his continued assistance by making false representations regarding their intention to provide plaintiff with alternate employment with the County following the completion of the Esmor prosecutions. To assert a claim of fraud under New Jersey law, a plaintiff must show "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by defendant of its falsity; (3) an intention that the plaintiff rely on it; (4) reasonable reliance by the plaintiff; and (5) resulting damages." *Gennari v. Weichert Co. Realtors, 148 N.J. 582, 691 A.2d 350, 367 (N.J. Sup. Ct. 1997). Federal Rule of Civil Procedure 9(b)* requires that all averments of fraud or mistake be stated with particularity. *See, e.g., GSC Partners CDO Fund v. Washington, 368 F.3d 228, 236 (3d Cir. 2004).* Furthermore, a plaintiff must establish a claim of fraud by clear and convincing evidence. *New Jersey*

Economic Dev. Auth. v. Pavonia Restaurant, 319 N.J. Super. 435, 725 A.2d 1133, 1139 (N.J. Super. Ct., App. Div. 1998) (citation omitted). Plaintiff alleges two theories of fraud claiming defendants made both oral and written misrepresentations.

With respect to the assertion of oral fraud, plaintiff argues that defendants fraudulently induced his continued cooperation with the prosecutor's office with unfulfilled oral promises of continued employment with Union County. He claims that such oral promises were not contained in the Neafsey letter because the letter would be used to impeach plaintiff's credibility at trial. Defendant Isenhour confirmed that the Neafsey letter, which he had authored, was likely to be used against plaintiff at trial. However, Isenhour claimed that this knowledge caused him to add "fluff" about plaintiff and to leave out what he considered to be the true "benefit" to plaintiff, namely an agreement not to criminally prosecute the plaintiff. (Shea Certif., Exh. G, Isenhour Dep. 74:6-75:17.) Isenhour at no point testified that future job opportunities with the County were promised but not contained in the letter.[8] Even taking these oral statements into consideration, plaintiff fails to allege a misrepresentation which is a fatal flaw in his fraud allegation.

Plaintiff's reference to assurances that he would not be harmed fall well short of a representation that he would continue to have a job in Union County. Plaintiff relies on such statements that plaintiff "might be assigned to the Auto Task Force" or that he "could be transferred" to the Auto Task Force or the Narcotics Strike Force. These statements do not remotely provide for guaranteed employment with the County, thus even if these statements were made there is no

material representation. As already noted, these representations appear to be nothing more than gratuitous remarks to look into the possibility of another position within the County. Plaintiff even testified at the 1998 Esmor trial and again during his January 2004 deposition that he had not been promised a position with Union County. (Hatfield Aff., Exh. H, 1/22/98 Trans. 73:19-22; Exh A, Espinosa Dep. 371:23-372:4.)

Furthermore, some of the statements plaintiff claims induced him to continue assisting in the Esmor prosecutions actually occurred after the prosecutions were completed. The Esmor trials concluded in April 1998, and the last defendants were sentenced in May of that same year. Despite this fact, plaintiff claims that he relied on statements allegedly made during a March 1999 meeting with defendant Lapolla. These statements clearly could not have induced plaintiff to continue assisting in a prosecution that had already been completed. Thus, the record is devoid of any evidence supporting a finding of fraud with regard to the oral statements.

In addition to the claim of fraud regarding oral promises, plaintiff apparently claims that fraud occurred with respect to the written promises contained in the Neafsey Letter. Although there was no mention of fraud in this regard in the complaint, plaintiff addresses it at length in his opposition brief. It appears as though this claim of fraud is not properly before the Court as it was not been appropriately alleged in the complaint pursuant to *Fed. R. of Civ. P. 9(b)*, which requires all averments of fraud be stated with particularity.

Even if the written fraud claim was properly alleged, plaintiff has not shown sufficient evidence for the claim to survive the instant motion for summary judgment. To reiterate, the Neafsey letter promised to provide plaintiff with assistance in finding a job in Florida, including a willingness to positively recommend plaintiff to other law enforcement agencies and to contact "high ranking government officials," and to reimburse plaintiff up to $ 15,000 in relocation expenses. Plaintiff has presented no evidence that he requested and defendant refused to provide said assistance. Although a 1996 record of the Miami Dade Police Department shows that defendant Durkin commented that plaintiff had a "long history of continuous violations of employment rules," plaintiff has admitted that he received numerous reprimands and three suspensions over the course of his employment with Union County. (Def.'s SOF PP29, 165(1)(C); Shea Certif. Exh. EEE.) The Neafsey letter provides a promise to attest to plaintiff's integrity during the Esmor trials and nowhere promises to conceal plaintiff's entire personnel record and employment history upon inquiry. Additionally, there is evidence of Union County's entirely positive evaluation of plaintiff's employment history in a verification form and an employment questionnaire from Miami Dade Corrections, both of which were completed by defendant Dougherty.

In regard to the $ 15,000 for moving expenses, there is no evidence in the record that plaintiff asked for and was refused reimbursement for moving expenses. Although plaintiff did speak to Durkin about reimbursement, Durkin explained that plaintiff must obtain quotes and then return with an actual figure.

Nothing in the record supports a conclusion that plaintiff returned with a quote and was refused. Additionally, plaintiff testified himself that he was not sure if his attorney *ever actually requested a* reimbursement of the moving expenses. (Hatfield Aff., Exh. A, Espinosa Dep. 181:11-14.) Further, defendant was paid, despite the agreement, by the County for over two years after his assistance with the Esmor prosecutions without having to work, a figure that more than covers the $ 15,000 moving expenses.

Despite plaintiff's assertion that there is "clear and convincing evidence that [the written and oral] assurances were known to be false at the time they were made," no evidence has been offered to support this allegation. Thus, defendants' motion for summary judgment is granted.

F) Count XI--Defamation

Defendants also seek summary judgment on the defamation claim, arguing that plaintiff has put forth no proof that the allegedly defamatory statements were ever published. Plaintiff alleges that the disciplinary charges placed in his file with Union County are false, and that the defendants defamed him by publishing his file to potential employers. Alternately, plaintiff seeks to invoke the "compelled self-publication" doctrine, as he claims that he was and is forced to publish the allegedly false information to potential employers himself.

"A defamatory statement is one that is false and 'injurious to the reputation of another' or exposes another person to 'hatred, contempt or ridicule' or subjects another person to 'a loss of the good will and confidence' in which he or she is held by others."

Romaine v. Kallinger, 109 N.J. 282, 537 A.2d 284, 287 (N.J. Sup. Ct. 1988) (citations omitted). To establish a claim of defamation under New Jersey law, a plaintiff must show that the defendant: "(1) made a defamatory statement of fact; (2) concerning the plaintiff; (3) which was false; and (4) which was communicated to a person or persons other than the plaintiff." *Beck v. Tribert, 312 N.J. Super. 335, 711 A.2d 951, 958-959 (N.J. Super. Ct., App. Div. 1998).* Plaintiff claims that defendants published the allegedly defamatory statements from plaintiff's personnel file to prospective employers, causing him to lose job opportunities with Miami Dade County Corrections and Broward County during 2001 and 2002.

Plaintiff provides no evidence to support his conclusion that defendants' publication of his personnel file was the reason for his lost job opportunities, thus defendant's summary judgment motion must be granted. *See Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (noting that the party moving for summary judgment has the burden of showing that no genuine issue of material fact exists, and this burden may be discharged by exposing "the absence of evidence to support the nonmoving party's case.") In fact, plaintiff notes that neither Miami Dade County Corrections nor Broward County explained to him the reason why he was not hired.

Plaintiff notes that Durkin was contacted by the Miami Dade Police Department for information about plaintiff and alleges that Durkin characterized plaintiff as having a "long history of continuous violations of employment rules," which was recorded in a 1996 applicant evaluation worksheet. Durkin denies saying anything derogatory, and claims that he referred the

request for personnel information to the County since the plaintiff was an employee of the Department of Corrections and not the prosecutor's office. Even if these statements were made, plaintiff admits that he received numerous reprimands and three suspensions over the course of his employment with Union County. (Def.'s SOF PP29, 165(1)(C); Shea Certif. Exh. EEE.) Thus, any statements made by Durkin were truthful, and the truth of a statement is a complete defense to a defamation action. *McLaughlin v. Rosanio, Bailets & Talamo, Inc., 331 N.J. Super. 303, 751 A.2d 1066, 1071 (N.J. Super. Ct., App. Div. 2000)* (citation omitted).

Plaintiff further argues that the publication requirement for his defamation claim is supported under the doctrine of "compelled self-publication," as he was and will continue to be compelled to provide allegedly false and defamatory information to prospective employers as part of the employment application process. In the Court's opinion, the only case cited by plaintiff is not authority for the notion that compelled self-publication satisfies the publication requirement in a defamation action. *See Monroe v. Host Marriott Services Corp., 999 F. Supp. 599, 604 (D.N.J. 1998).* In fact, the cases cited in *Monroe* actually stand for the proposition that compelled self-publication is not the rule in many districts within the Third Circuit. *See Lynch v. Mellon Bank of Del., 1992 Del. Super. LEXIS 551, *3 (Del. Super. March 12, 1992)* ("Although the concept of self-publication has been accepted in a minority of other jurisdictions, it is not the law in Delaware."); *DiPietro v. Jefferson Bank, 1993 U.S. Dist. LEXIS 4047, *1 (E.D. Pa. April 1, 1993)* ("Pennsylvania does not recognize a cause of action for defamation based on self-publication.") Plaintiff has not provided

this Court with any authority for the proposition that compelled self-publication is the law in New Jersey. Therefore, this doctrine does not satisfy the publication requirement and summary judgment is granted.

G) Count IX--Tortious Interference with Prospective Economic Advantage

Defendants also seek summary judgment of the tortious interference with a prospective economic advantage claim arguing plaintiff has put forth no evidence supporting a conclusion that defendants interfered with plaintiff's prospective employment opportunities. Plaintiff claims that the defendants tortiously interfered with his prospective economic advantage by terminating his employment with the County and maintaining false disciplinary charges in his employment file for over a year. The loss of prospective economic advantage claim is with respect to plaintiff's continued employment with the County, as well as prospective employment opportunities elsewhere.

New Jersey has long recognized a cause of action for interference with one's prospective economic advantage. *Starting Nine, Inc. v. Highgate Prods., Inc., 1993 U.S. Dist. LEXIS 8593 (D.N.J. 1993).* The four elements necessary to establish a *prima facie* case for tortious interference with prospective economic advantage include: (1) the existence of a protectable right, such as a prospective economic relationship; (2) intentional and malicious interference by the defendant; (3) the loss of a prospective gain caused by the interference; and (4) damage. *Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 563 A.2d 31, 37 (N.J. Sup. Ct. 1989).* The protectable right need not equate with an enforceable contract, but

there must be a "reasonable expectation of economic advantage." *Id.* Further, the standard for malicious interference "must be flexible and must focus on a defendant's actions in the context of the case presented." *Id. at 40.*

Plaintiff claims that his disciplinary record containing false charges had a negative impact on his job search. However, much like the defamation claim, plaintiff provides no specific evidence to support his claim that his disciplinary record had a negative impact on any job opportunity. Plaintiff notes that several prospective employers did not explain to him the reason why he was not hired. This allegation is nothing more than mere speculation, as previously discussed at length.

Plaintiff further claims that the defendants' interference caused him to lose employment with Union County. "It is fundamental to a cause of action for tortious interference with a prospective economic relationship that the claim be directed against defendants who are not parties to the relationship." *Printing Mart-Morristown, 563 A.2d. at 37* (citations omitted). The County defendants in this case were parties to the economic relationship, and thus the claim cannot go forward. Since plaintiff has produced no evidence in support of the claim that the County's interference caused him to lose a prospective economic gain, the defendants' motion for summary judgment is granted.

H) Defendants' Counterclaims

Defendants have filed three counterclaims, including a breach of the implied covenant of good faith and fair dealing, conversion, and unjust enrichment.

Plaintiff moves for summary judgment on all three of these claims.

(i) Counterclaim I--Implied Covenant of Good Faith and Fair Dealing

Plaintiff argues there was no valid enforceable contract between the County and plaintiff limiting his employment rights, therefore a breach of the implied covenant of good faith and fair dealing could not exist and summary judgment should be granted. Defendants assert a claim for breach of the implied covenant of good faith and fair dealing as a result of plaintiff accepting pay for over two years after the trial was concluded. Defendants argue there was an express and/or implied agreement that plaintiff would testify in exchange for continued receipt of his salary and benefits through the end of the trial, although he would not actually be working.

Every contract made under New Jersey law contains an implied covenant of good faith and fair dealing. *Fields v. Thompson Printing Co., 363 F.3d 259, 270 (3d Cir. 2004).* Under the covenant, neither party can do anything that will result in "destroying or injuring the right of the other party to receive the fruits of the contract." *Id.* In order to prove a claim for breach of the implied covenant of good faith and fair dealing, it is important to demonstrate a state of mind that is dishonest or contains "bad motive." *Wilson v. Amerada Hess Corp., 168 N.J. 236, 773 A.2d 1121, 1129 (N.J. Sup. Ct. 2001).*

While the Neafsey letter does appear to be an agreement between plaintiff and defendants, the Court need not go into a complex contract analysis since the facts are insufficient to support a breach of the implied

covenant of good faith and fair dealing. The defendants did receive the "fruits of the contract" since plaintiff testified as promised. *See Fields, 363 F.3d at 270.* Additionally, plaintiff's actions do not demonstrate that he was acting dishonestly or with a "bad motive," as he did not underhandedly continue to collect his salary or retain it in defiance of requests for its return. *See Wilson, 168 N.J. at 249.* Neither of the persons involved in creating this "contract," Durkin or Isenhour, had any expectation plaintiff would return to the jail at the close of the trial and both were under the impression plaintiff was moving to Florida. (Shea Certif., Exh. G, Isenhour Dep. 72:8-23; Exh. D, Durkin Dep. 116:4-11.)

The County's Finance Department, as well as the jail directors, were also fully aware the County continued to pay plaintiff after the conclusion of the trial in 1998 until 2000. (Pl.'s SOF PP125, 129.) Lapolla, then Union County Manager, testified that he knew in February 1999 that Plaintiff was still receiving payment. (*Id.* at P124.) Despite this knowledge, Lapolla, as well as several other individuals employed by the County, testified that no one ever requested plaintiff return this money. (*Id.* at PP130-134.) Furthermore, the newly appointed assistant director of the jail, Dougherty, was told by personnel technician Filomena Karabinchak that plaintiff should remain on payroll "until further notice." (Shea Certif., Exh. C, Dougherty Dep. 26:3-27:15, 46:7-12.) Karabinchak and Dougherty discussed plaintiff's pay "numerous times," but Dougherty testified he was following orders that were in place before he began work at the jail. (*Id.* at 26:21-24.) Thus, it is apparent that there are no facts to support defendants' claim that plaintiff breached the

implied covenant of good faith and fair dealing and summary judgment is granted.

(ii) Counterclaim II--Conversion

Plaintiff next asserts that summary judgment should be granted as to defendants' claim for conversion since the County never requested plaintiff return the salary payments. Defendants filed a claim for conversion arguing plaintiff "wrongfully seized" $ 114,732.08 since plaintiff knew he had no right to retain this money because he was not working.

Under New Jersey law, conversion is "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Philadelphia Reserve Supply Co. v. Nowalk & Assocs., 1995 U.S. Dist. LEXIS 9723, *36 (E.D. Pa. 1995)* (citing *Slowinski v. Valley National Bank, 264 N.J. Super. 172, 624 A.2d 85, 94 (1993))*. In the event possession is lawfully acquired, there must be a refusal to deliver on demand to evidence conversion. *Id.* (citing *Mueller v. Technical Devices Corp., 8 N.J. 201, 207, 84 A.2d 620, 623 (1951))* (quoting *Farrow v. Ocean County Trust Co., 121 N.J.L. 344, 2 A.2d 352 (1938))*. Burden of proof of a demand and a denial rests with the claimant. *Mueller v. Technical Devices Corp., 8 N.J. 201, 84 A.2d 620, 623 (N.J. Sup. Ct. 1951)*.

Plaintiff's salary and benefits were lawfully acquired. He did not use any illegal methods to obtain the funds, rather the County knowingly continued to send him his salary payments. Since he obtained the money lawfully, defendants have the burden of demonstrating a demand for the return of the money

and a refusal of said demand. Although defendants assert they have made such a demand, they present no evidence supporting this general allegation and plaintiff instead presents evidence to show there have been no such requests. Plaintiff points to deposition testimony from Lapolla admitting that the County had not demanded plaintiff return any salary or benefits, as well as admissions from several other County employees corroborating this testimony. (*See* Pl.'s SOF PP130-134.) Therefore, there are insufficient facts to support defendant's claim of conversion and summary judgment is granted.

(iii) Counterclaim III--Unjust Enrichment

Finally, plaintiff contends summary judgment should be granted as to defendant's claim of unjust enrichment because plaintiff remained a tenured employee, the County was aware he was receiving salary payments, and the County never requested return of these monies. Defendants' claim plaintiff's retention of his salary after the conclusion of the trial constituted unjust enrichment and is contrary to public policy since it is at the taxpayers' expense.

To establish a claim for unjust enrichment, the claimant must show that the defendant received a benefit and retention of that benefit would be unjust. *VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 641 A.2d 519, 527 (N.J. Sup. Ct. 1994).* Claimant must also demonstrate that at the time the benefit was conferred he expected remuneration from the benefitted party and the failure of remuneration enriched that party beyond their contractual rights. *Id.*

Defendants have not presented any facts that demonstrate they expected remuneration from

plaintiff. The County knowingly continued to pay plaintiff his salary, yet plaintiff had expressed to defendants he did not want to return to work. (Pl.'s SOF PP124-125, 129.) Further, defendants did not expect plaintiff to return to the jail after the conclusion of the trial. (Shea Certif., Exh. G, Isenhour Dep. 72:8-23; Exh. D, Durkin Dep. 116:4-11.) Plaintiff met with Durkin after the trial and met with Lapolla a year later to discuss his employment situation with the County. Despite these meetings, defendants did not request plaintiff perform other work within the County in return for his salary. Since the facts do not show there was any expectation of remuneration from plaintiff, there cannot be a claim for unjust enrichment and summary judgment is granted.

IV) CONCLUSION

In conclusion, the complaint and counterclaims are **DISMISSED** in their entirety. An order will be issued in conjunction with this opinion.

Dated: 8/30/05

WILLIAM J. MARTINI, U.S.D.J.

ORDER

This Court, having considered plaintiff's and defendants' written submissions in support of their summary judgment motions, and for the reasons stated in the accompanying Opinion, and for good cause shown,

IT IS on this 30th day of August 2005, hereby

ORDERED that plaintiff's complaint and defendants' counterclaims are dismissed in their entirety.

WILLIAM J. MARTINI, U.S.D.J.

Footnotes

n1 Plaintiff's state law claims consist of: (1) Conscientious Employee Protection Act ("CEPA"), (2) aiding and abetting CEPA, (3) constructive discharge, (4) state constitutional tort, (5) breach of contract and implied covenant of good faith and fair dealing, (6) New Jersey public policy, (7) tortious interference with a prospective economic advantage, (8) intentional infliction of emotional distress, (9) defamation, and (10) fraud.

n2 Lt. Salay was charged with second degree official misconduct, for which he took a plea. (Def.'s SOF P57.) Plaintiff conceded that but for his cooperation, he might have been indicted for his failure to further report the incident. (Def.'s SOF P58; Hatfield Aff., Exh. H., 1/22/98 Trans. 79:23-80:7.)

n3 This letter was drafted by Assistant Prosecutor Thomas Isenhour. (Def.'s SOF P73.)

n4 Notably, plaintiff requested Lapolla write a letter of recommendation for him to the Atlanta Police Department in September 1998. (Def.'s SOF P93.)

n5 Defendants initially contend that plaintiff's testimony is not protected under CEPA because he testified about the conduct of a co-worker. However, CEPA protects against retaliation for disclosure of a co-worker's action. *DeLisa v. County of Bergen, 165 N.J. 140, 755 A.2d 578, 582 (N.J. Sup. Ct. 2000).*

n6 Even if it was not waived by CEPA, plaintiff still cannot maintain this claim because defendants admittedly terminated plaintiff for abandoning his

position, thus plaintiff did not resign. *See Jordan v. City of Gary, 396 F.3d 825, 837 (7th Cir. 2005)* (citing *McPherson v. City of Waukegan, 379 F.3d 430, 440 (7th Cir. 2004)* ("We can make it no plainer than to reiterate that constructive discharge "'refers to a situation in which an employee is not fired but quits.'")).

n7 Plaintiff waives the fraud claim against defendants Coleman, Gibson, and Dougherty.

n8 Notably, plaintiff claims that he was "satisfied" with the content of the letter, and no one ever told him that the letter was anything but the "real deal." (Hatfield Aff., Exh. A, Espinosa Dep. 99:4-25.)

Dated 2/26/07
No. 05-4278; No. 05-4382
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JUAN C. ESPINOSA; MAUREEN ROIG-ESPINOSA, his wife, Appellants in No. 05-4278

v.

COUNTY OF UNION; STATE OF NEW JERSEY; POLICEMEN'S BENEVOLENT ASSOCIATION UNION COUNTY CORRECTIONS OFFICERS LOCAL #199, INC.; JOHN DOES 1-25 (fictitious names intending to designate currently unknown entities and persons, individually and in their official capacities; COUNTY OF UNION BOARD OF CHOSEN FREEHOLDERS; UNION COUNTY PROSECUTOR'S OFFICE; JAMES J. DURKIN, individually and in his official capacity; THEODORE J. ROMANKOW, UNION COUNTY PROSECUTOR in his official capacity, and his predecessors and successors also known as THEODORE J. ROMANLOW; THOMAS K. ISENHOUR, individually and in his official capacity; DIRECTOR JAMES E. COLEMAN; JAMES F. DOUGHERTY, JR.; HAROLD GIBSON; MICHAEL J. LAPOLLA County of Union and County of Union Board of Chosen Freeholders, Appellants in No. 05-4382

On Appeal from the United States District Court for the District of New Jersey (D.C. Civil No. 01-cv-03655)
District Court Judge: Honorable William J. Martini

Present: Scirica, Chief Judge, Sloviter, McKee, Rendell, Barry, Ambro, Fuentes, Smith, Fisher, Chagares, Jordan and *Van Antwerpen, Circuit Judges, and **Padova, District Judge

Sur Petition for Rehearing with Suggestion for Rehearing En Banc

The petition for rehearing filed by Appellants/Cross-Appellees having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby denied.

*Honorable Franklin S. Van Antwerpen vote limited to panel rehearing only.

**Honorable John R. Padova, District Judge of the Eastern District of Pennsylvania, sitting by designation, vote limited to panel rehearing only.

No. 06-1641

IN THE

Supreme Court of the United States

JUAN C. ESPINOSA, *et ux.*,

Petitioners,

v.

UNION COUNTY, NEW JERSEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR UNION COUNTY RESPONDENTS

KATHRYN V. HATFIELD
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QUESTION PRESENTED

1. Whether the District Court's decision dismissing Petitioners' complaint should be affirmed where the court found as a matter of law that the Petitioner was not terminated for engaging in protected activity but rather because he refused to return to work after being ordered to do so?

2. Whether Petitioner is barred from pursuing his legal claims because he abandoned his position after he failed to return to work?

3. Whether a public employer has a duty to provide alternative employment for an employee who, as part of his obligations as a law enforcement officer, testifies against fellow correction officers and who then, unlike other similarly situated testifying officers, refuses to return to work?

4. Whether the District Court erred in finding that Petitioner had received due process of law where the undisputed material facts of record showed no connection between Petitioner's alleged protected conduct and his termination; that Petitioner was the only testifying officer to refuse to return to work; that, in spite of Petitioner's refusal to return to work he demanded to receive full pay and benefits for an indefinite period of time; that Petitioner was receiving full pay and benefits from the County while refusing to report to work; that there was no legally enforceable agreement to provide Petitioner with alternate employment; and that the County acted within its rights in terminating Petitioner's employment under these circumstances?

PARTIES TO THE PROCEEDING

JUAN C. ESPINOSA; MAUREEN ROIG-EXPINOSA, PETITIONERS

COUNTY OF UNION; STATE OF NEW JERSEY; POLICEMEN'S BENEVOLENT ASSOCIATION UNION COUNTY CORRECTIONS OFFICERS LOCAL #199, INC.; JOHN DOES 1-25 (fictitious names intending to designate currently unknown entities and persons, individually and in their official capacities.); COUNTY OF UNION BOARD OF CHOSEN FREEHOLDERS; UNION COUNTY PROSECUTOR'S OFFICE; JAMES J. DURKIN, individually and in his official capacity; THEODORE J. ROMANKOW, UNION COUNTY PROSECUTOR in his official capacity and his predecessors and successors also known as THEODORE J. ROMANKOW; THOMAS K. ISENHOUR, individually and in his official capacity; DIRECTOR JAMES E. COLEMAN; JAMES F. DOUGHERTY, JR.; HAROLD GIBSON; MICHAEL J. LAPOLLA County of Union and County of Union Board of Chosen Freeholders, RESPONDENTS

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RELEVENT PROVISIONS INVOLVED

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ."

N.J.S.A. § 34:19-3:

"forbids employers from retaliating against an employee who . . . [p]rovides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer . . .;"

N.J.A.C. § 4A:2-6.2(b):

"[a]ny employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing."

STATEMENT OF THE CASE

In June 1995, Union County Correction Officer, Petitioner Juan Espinosa, witnessed fellow correction officers severely beat and torture INS detainees at the Union County Jail in Elizabeth, New Jersey. Although a superior officer at the time, Espinosa did not intercede on behalf of

those being beaten nor did he report the criminal activities of his fellow correction officers to any supervisor or the Union County Prosecutor's Office. Upon investigating the crime, the Union County Prosecutor's Office discovered that Espinosa had witnessed the beatings and reached out to him for assistance.

In exchange for his testimony against numerous correction officers in grand jury and trial proceedings, as well as wearing a recording device inside the jail, the Prosecutor's Office agreed to not prosecute Espinosa in connection with the beatings. In addition, the Prosecutor's Office arranged to have the County continue to pay Espinosa's salary and benefits until the conclusion of the officers' trials. The Prosecutor's Office further agreed to provide recommendations and references to assist Espinosa to secure future employment, and also agreed to pay Espinosa up to $15,000 for relocation expenses. The Prosecutor's Office memorialized the promises to Espinosa in a letter. Thus, "Espinosa knew in 1995 that the County intended to take him off the payroll after the conclusion of the trials because he was no longer performing any services for the County." (App. 14a)

During the investigation and prosecution of fellow correction officers, Espinosa was permitted to leave his post at the jail due to the volatile work environment caused by his participation with the Prosecutor's Office. Despite Espinosa's obligations with the Prosecutor's Office ending in May 1998, when all trials and sentencing related to the incident were complete, he continued to receive salary and benefits from the County. During this time, however, "Espinosa did not have permission to be absent and he failed to perform any services for the County justifying compensation . . .." (App. 19a) Unlike Espinosa, other testifying officers continued to work in the Jail and returned to their posts following the completion of trials and

sentencing. In August 2000, the Division of Corrections requested Espinosa either to return to duty or resign. Espinosa knew he "wasn't going to be home getting paid forever" (App. 21a), yet he refused to return to work, resign, or abandon his post. Espinosa's decision placed the County in the unfeasible position of continuing to pay Espinosa for an undetermined period of time despite his no longer working for the County. Consistent with applicable Civil Service rules, the County preferred disciplinary charges against Espinosa for abandoning his post and, following a departmental hearing, duly terminated his employment.

REASONS FOR DENYING THE PETITION

1. The Third Circuit Properly Followed This Court's Jurisprudence When Evaluating The Petitioner's First Amendment Claims And, In Addition, Public Policy Does Not Justify Granting The Petition.

The Petitioner may not rest on mere allegations that the County penalized him for his protected speech, but rather must set forth "significant probative evidence tending to support the complaint." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (if the evidence is merely colorable or not significantly probative summary judgment is appropriate); *see also Crawford-El v. Britton*, 523 U.S. 574, 592 (1998) (existing law already prevents the more narrow element of unconstitutional motive from automatically carrying a plaintiff to trial). Petitioner was permitted to temporarily leave his post at the jail during his participation with the investigation and prosecution of fellow jail guards involved in the INS detainee beatings. Although the Petitioner alleges he was penalized for his protected speech and only recalled to duty so he could be

fired, "the proposition carries the soundness of logic along with its defect: its separation from context," the same criticism made by the Petitioner of the Court of Appeal's opinion. The Petitioner admittedly knew that he was going to be taken off the payroll after the conclusion of the trials and, importantly, testified at his deposition that he would *not* have been terminated had he returned to the jail and started working on August 14, 2000. (App. 14a) The Petitioner's own words about his absence and ability to return to work contradict his current argument that the only factor behind his termination was his testimony.

The Court of Appeals' determination that the Petitioner failed to establish a causal connection between his testimony and later termination, corresponds with this Court's jurisprudence relating to § 1983 retaliatory action claims. *See Hartman v. Moore*, 126 S.Ct. 1695, 1703 (2006) (plaintiff has the initial burden to plead and prove adverse official action in retaliation for making statements); *Crawford-El*, 523 U.S. at 598 ("[T]he court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury . . . ."). This Court in *Hartman* went on to hold that action colored by some degree of bad motive, proof of some retaliatory animus in an official's mind, does not amount to a constitutional tort if the action would have been taken anyways. *Hartman*, 126 S.Ct. at 1704.

The Court of Appeals did not contravene this Court's jurisprudence when it recognized that the Petitioner failed to establish a colorable connection between his expressive conduct and his termination. Indeed, it was Espinosa's affirmative action of not returning to work, and not his choice to testify, which was the basis for his removal. As the Court of Appeals recognized, had the County desired to fire Espinosa based on his testimony, he would have been fired regardless of whether or not he returned to work.

However, Espinosa's own words contradict such a motivation by the County.

Even when the general rule has been clearly established (the first amendment bars retaliation for protected speech) the substantive legal doctrines on which the plaintiff relies may facilitate summary judgment. *Crawford-El*, 523 U.S. at 592-93 (finding that doubt as to the illegality of the defendant's conduct and insufficient connection between the alleged animus and particular injury may support the granting of summary judgment). The Court of Appeals did not "subvert the very purpose of § 1983" when denying the Petitioner's claims, but rather the Petitioner's unsuccessful attempts to establish a tenuous connection between his termination and a constitutionally protected interest were at the heart of his failed claims.

The Petitioner next posits that the Court of Appeals' decision only will enforce the code of silence amongst law enforcement and prevent persons, like the Petitioner, from testifying truthfully. However, in this misguided belief, the Petitioner is contradicted by the plain fact that "all other officers that testified during the trial, one of which also wore a wire inside the jail to assist in the investigation, returned to work immediately after testifying." (App. 32a) Certainly, there is a strong public policy in favor of witnesses coming forward and testifying truthfully during trial proceedings; however, there is no indication that the County's actions in dismissing the Petitioner when he refused to return to work while expecting to be paid, somehow leaves future witnesses with an "impossible choice." Indeed, it was Petitioner who imposed upon the County an "impossible choice" of continuing to provide the Petitioner full pay and benefits despite the Petitioner not performing any service for the County and also being gainfully employed by a different employer during the same time period. Neither public policy nor this Court's

jurisprudence relating to § 1983 claims justify the granting of certiorari.

2. The Lower Court's Granting of Summary Judgment Was Appropriate Under the Circumstances And Did Not Violate The Petitioner's Seventh Amendment Right To A Jury Trial.

Due process is not a technical conception with a fixed content that may be separated from time, place and circumstances. *Gilbert v. Homar*, 520 U.S. 924, 930-31 (1997) (emphasizing the flexibility of the concept as contrasted with any type of sweeping and categorical rule defining due process). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

In line with this Court's conception of due process, the summary judgment procedure is regarded as an integral part of the Federal Rules, which is intended to secure a just, prompt and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). It should *not* be regarded as a disfavored procedural shortcut. *Id.* Unlike the concept of summary judgment forwarded by the Petitioner, this Court has held that the burden on the moving party is to point out to the lower court that there is an absence of evidence to support the nonmoving party's case. *Id.* at 325 (moving party does not bear the burden to produce evidence showing the absence of a genuine issue of material fact). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Liberty Lobby, Inc.*, 477 U.S. at 247-48.

Despite the Petitioner's argument to the contrary, the Court of Appeals did "draw all justifiable inferences in

the non-movant's favor" and still determined that such information would not have precluded summary judgment. The lower court considered the potential evidence the Petitioner sought to produce and the reasonable inferences manifested, but ultimately concluded that such evidence was cumulative and that the District Court acted well within its discretion. *See Old Chief v. United States*, 519 U.S. 172, 180, 183 (1997) (finding that determinations as to cumulativeness and relevance of potential evidence is within the province of the trial judge and reviewing courts must evaluate the lower court's decision from that perspective and not indulge in review by hindsight). The Court of Appeals decision falls squarely in line with this Court's jurisprudence and did not intrude into an area better left to the province of the jury.

The Court of Appeals did not overreach when affirming summary judgment against the Petitioner. The Court of Appeals' determination that the Petitioner had a weak constitutional interest in terms of his employment with the County is consistent with this Court's jurisprudence. In *Gilbert*, this Court established that when determining what process is constitutionally due, a court must balance the interests of the parties, the procedures used, and the probative value of additional/substitute procedural safeguards. 520 U.S. at 931-32. This Court went on in *Gilbert* to determine that the state has a significant interest in maintaining public trust and confidence in employees such as police officers, and that when an individual's services are no longer useful to the government, the Constitution does not require the state to bear the burden of hiring a replacement while still paying the person. *Id.* at 932.

As the Court of Appeals recognized, the County had a strong interest in removing a nonworking employee from the payroll, as compared to the Petitioner's interest in being

kept on the County payroll in addition to receiving pay and benefits as a full time employee for a different employer. The Court of Appeals' balancing approach to the Petitioner's due process claims closely mirrors this Court's jurisprudence advanced in *Gilbert*.

The Court of Appeals' decision did not undermine the Petitioner's right to a jury trial under the Seventh Amendment nor did it violate due process protections. The lower court acted well within the jurisprudence established by this Court when determining that the Petitioner's claims failed as a matter of law.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Supreme Court deny the petition for certiorari.

Respectfully submitted,
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(3)

No. 06-1641

IN THE

Supreme Court of the United States

JUAN C. ESPINOSA, *et ux.*,

Petitioners,

v.

UNION COUNTY, NEW JERSEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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The Respondents did not address the simple and undisputed bases for the Petition for a Writ of Certiorari.

First, it was "undisputed" that Petitioner had a constitutionally protected "property interest in his job" as a jail guard at all times including when the Respondents ordered him to return to the jail. (App. 16a) (The Respondents' reliance on *Gilbert v. Homar*, 520 U.S. 924 (1997), provides no support for the lower Court's *sua sponte* conclusion that the Petitioner had a "weak" constitutional interest in his job.)

Second, it is undisputed that the Respondents admitted that the Petitioner "would be unable to return to work" in the jail and the lower Court took as true Petitioner's assertion that he "could not return to work." (App. 23a, 27a.) (The Petitioner was the first guard to break the Blue Wall of Silence. Also, the Petitioner was the only guard who tried to help the abused detainees, identified by the detainees as having tried to help them, praised as courageous in writing by the Prosecutor for his voluntary testimony, and permitted to leave the jail for safety reasons.)

Third, it was undisputed that Petitioner repeatedly pleaded for comparable alternative employment outside the jail and the Respondents never made any efforts to find alternative employment although they freely admitted that such positions were available.

Fourth, it is undisputed that the Petitioner now holds a nontenured position with a lower rank, earns less than half his prior salary, and will lose in excess of a million dollars through his retirement given his reduced salary, loss of benefits and pension, and overtime pay.

It is respectfully submitted that the termination of Petitioner's tenured employment for not returning to the jail was unlawful, and inherently discourages any law enforcement officer from voluntarily, and truthfully, testifying against a fellow officer in the future.

CONCLUSION

Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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